Jurisdictional Statement

81-1882

No.

Supreme Court, U.S.
FILED
APR 9 1982
ALEXANDER L. STEVAS
CLERK

In The Supreme Court of the United States

October Term, 1981

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties,

Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether Chapter One, Laws of 1980, 4th Special Session, 34th Arizona Legislature (herein called the "1980 Act" or the "Act") is void as depriving appellants of liberty and property without due process of law and without just compensation and of equal protection of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Whether the Arizona Supreme Court by (a) misconstruing the 1980 Act as a statute of prospective application, and (b) by abruptly and arbitrarily refusing to adhere to and follow settled Arizona groundwater law rested its decision and judgment in this case upon a fair or substantial basis within the meaning of *Broad River Power Co. v. South Carolina*, 281 U.S. 537, (1930) and related cases.

Whether the decision and judgment of the Arizona Supreme Court constituted such a surprising and unpredictable change in and departure from previously settled Arizona groundwater law as to contravene appellants' constitutional guarantees under the Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES

The appellants are the TOWN OF CHINO VALLEY, an Arizona municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties. The appellee is the City of Prescott, an Arizona municipal corporation.

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OPINION BELOW

The decision and judgment of the Arizona Supreme Court in *Chino Valley v. Prescott* (herein *"Chino Valley II"*), ____ Ariz. ____, 638 P.2d 1324 (1981) appears in Appendix A.

THE JURISDICTION OF THIS COURT

This is an appeal from the judgment of the Arizona Supreme Court upholding the validity of the 1980 Act despite appellants' claim that the Act was void by reason of the provisions of the Fifth and Fourteenth Amendments to the United States Constitution and affirming the trial court's dismissal of appellants' complaint seeking an injunction against the City of Prescott's withdrawal and carrying away of groundwater.[1]

The Opinion and Judgment of the Arizona Supreme Court in this case was entered on November 30, 1981 (App. A), and the Order denying appellants' December 14, 1981 Motion for Rehearing entered January 15, 1982 (App. C). Amended Notices of Appeal were filed in the Supreme Court of the State of Arizona and the Yavapai County Superior Court on February 10, 1982 (App. D).

Jurisdiction over the first question presented on appeal is conferred by Title 28, United States Code, §1257(2). The Court has appellate jurisdiction over the second and third questions presented under *Flournoy v. Wiener*, 321 U.S.

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[1] The trial court's order had dismissed appellants' complaint for an injunction and had allowed an amendment for damages. The judgment appealed from is final under state law as to the federal constitutional challenge to the Act. *See State v. Griffith*, 54 Ariz. 436 at 441, 96 P.2d 752 (1939), and the mandate of the Arizona Supreme Court dated January 18, 1982 (App. B). The judgment appealed from is final within the meaning of Title 28, United States Code, §1257. *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964); *Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 548-552 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-8 (1963).

253, 263 (1944), and *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922). Jurisdiction over the second and third questions is also conferred by Title 28, United States Code, §1257(3). Title 28, United States Code, §2103.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the United States Constitution:

> . . . [N]or shall any person . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter One, Laws of 1980, 4th Special Session, 34th Arizona Legislature. Pertinent provisions of this lengthy statute are reproduced in Appendix E.

STATEMENT OF THE CASE

Appellant Town of Chino Valley, a small Arizona municipal corporation, is located in the Little Chino Valley, a farming and small-acreage homesite area almost wholly dependent on groundwater for domestic and farming uses. The remaining appellants are landowners who live within the Town of Chino Valley or contiguous thereto and who use groundwater. The Town of Chino Valley lies approximately 17 miles north of appellee the City of Prescott ("Prescott") astride State Highway 89.

Substantially the entire metropolitan area of Prescott is underlaid by hard rock and is devoid of an immediately available water resource. Three small lakes in a mountainous area south of Prescott provide it with an undepend-

able supply of water. In 1948, Prescott turned to the groundwater underlying the Little Chino Valley farming area as its main source of water for its water distribution business.

Increasing intrusions of Prescott into the groundwater resource of the Little Chino Valley led to the filing by appellants of a verified complaint against Prescott in the Superior Court of Yavapai County, Arizona, on their own behalf and on behalf of the other groundwater owners within the Little Chino Valley. The complaint sought to enjoin continuing withdrawals of groundwater from the Little Chino Valley for sale by Prescott to its customers, some 17 miles distant.

Prior to the 1980 Act, Prescott's motion to dismiss the complaint on the ground that appellants had no right to injunctive relief was denied. After the 1980 Act was passed, Prescott moved for reconsideration of the previous denial of the motion to dismiss arguing that the Act legalized Prescott's exportation of groundwater from the Little Chino Valley. Appellants argued that if the Act authorized Prescott to pump and transfer away their groundwater, the Act contravened the Fifth and Fourteenth Amendments to the United States Constitution. The trial court agreed with Prescott, reversed its earlier ruling, and dismissed the injunction claim.

Appellants presented their appeal of the dismissal of their injunction claim to the Arizona Supreme Court and again argued the unconstitutionality of the 1980 Act. The Fifth and Fourteenth Amendments were set out *in haec verba* in an appendix to the appellants' opening brief. The Arizona Supreme Court considered and rejected appellants' claims that the Act contravened the Fifth and Fourteenth Amendments to the United States Constitution stating:

> This brings us to conclude that appellants' position that the 1980 Act violates the Fifth and Fourteenth Amendments to the Constitution of the United States . . . cannot be sustained. *Chino Valley v. Prescott*, ____ Ariz. ____, 638 P.2d 1324, 1328.

Appellants, in their Motion for Rehearing (App. F) before the Arizona Supreme Court, asserted that the Court's arbitrary refusal to adhere to established groundwater law and its abrupt departure therefrom violated appellants' rights under the Fifth and Fourteenth Amendments. The Arizona Supreme Court rejected this argument by its order denying rehearing. It is this disavowal of long and well-established Arizona groundwater law which forms the basis of the second and third questions presented on appeal herein. In order to establish the case as to this issue, the overview of the Arizona law which follows is necessary.

In *Maricopa County Municipal Water Conservation Dist. v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931), the Arizona Supreme Court reviewed the Arizona law of water use and ownership. The court announced that the case was "one of the most important cases which has ever come before this court involving . . . a declaration of legal principles which will . . . govern . . . future agricultural development within the arid regions of Arizona." *Id.* at 71. The court stated that "these principles should be enunciated as clearly and definitely as possible, so that our citizens may know how to guide their future procedure. . . ." *Id.* at 71.

The court noted that the territorial governor had called the attention of the first legislature of the territory to the fact that "you may deem it advisable at this time, before rights become vested, to adopt a permanent policy as to the use of water for agricultural as well as mining purposes." 39 Ariz. at 76. The court decided that the failure of the territorial legislature to adopt legislation relating to groundwater coupled with its enactment of a statute adopting the common law of England as ". . . the rule of decision in all

the courts of this Territory" left "percolating subterranean water as the property of the owner of the land, subject to the rules of the common law." 39 Ariz. at 78-79.

The court also relied on a statement in *Howard v. Perrin*, 8 Ariz. 347, 76 P. 460 (1904), that groundwater belonged to the owner of the land. In response to the argument that the statement was dicta, the court in *Southwest Cotton* said:

> Whether such statement was, strictly speaking, dicta or not, *it has been accepted as the law of this jurisdiction for so long, and so many rights have been based on it,* that only the clearest showing that the rule declared was error would justify us in departing from it. Since the legislative branch of the government in the twenty-five years which have elapsed since the decision in the above case has not seen fit to contradict this interpretation of the law, but rather has confirmed it, we may reasonably assume we correctly stated its meaning. 39 Ariz. at 83 (emphasis added).

In the early 1950's the Arizona legislature considered legislation regarding ownership rights in groundwater. In 1952, the legislature created an Underground Water Commission ("Commission") and required it "to make a comprehensive study" of the groundwater problem and resource and submit a report, a "public document", to the governor and legislature not later than January 1, 1953. On January 12, 1952, the Arizona Supreme Court in a 3 - 2 decision set aside *Howard v. Perrin, supra,* and *Southwest Cotton, supra,* and, in practical effect, adopted the prior appropriation rule as the controlling principal as to groundwater ownership and use in Arizona. *Bristor v. Cheatham,* 73 Ariz. 228, 240 P.2d 185 ("*Bristor I*"). Rehearing was granted. On January 1, 1953, before the decision on the rehearing was rendered, the Commission made its required report which recommended, among other things, that the legislature enact legislation making the common law rule of absolute ownership subject to the correlative rights rule or some

other theory allowing for equitable apportionment of water among all legal users. The report also discussed *Bristor I*, and noted that the opinion on rehearing, then pending, would settle the legal status of Arizona's groundwater.

On March 14, 1953, *Bristor I* was set aside and vacated by the Arizona Supreme Court. *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 ("*Bristor II*"). *Bristor II* held that in Arizona a landowner owns the groundwater found therein pursuant to the common law, subject to the rule of reasonable use. The holding was based upon the court's recognition that its prior judicial pronouncements regarding the ownership of groundwater along with the territorial legislature's adoption of the common law established vested property rights in groundwater.

On March 18, 1953, the legislature directed that the Commission draft legislation designed to carry out substantially the recommendations of the Commission contained in its report and to submit this legislation to the legislature not later than January 31, 1954. However, no legislation was passed.

Despite being presented with a clear pronouncement by the Arizona Supreme Court in *Bristor II* as to the rights of its citizens to groundwater, the Arizona legislature acquiesced in and accepted the rule set down in *Bristor II*. Thus the decision in *Bristor II* requires close examination.

In *Bristor II* the court, in vacating *Bristor I*, stated that Arizona groundwater law had been thoroughly re-examined twenty-two years earlier in *Southwest Cotton, supra*, a decision that had expressly laid down the principles applicable to ownership and use of groundwater "so that our citizens may know how to guide their future procedure". 75 Ariz. at 231. The *Bristor II* court stated that many large investments had been made "with faith" in the court's prior pronouncements upon principles of Arizona groundwater law and that therefore the rights thereby acquired had become a property right protected by law. *Ibid.* The court bluntly criticized *Bristor I* as attempting to de-

clare groundwaters as public "notwithstanding this court has ruled to the contrary for the past forty-nine years" and stated: "The statute, Section 1-106, A.C.A. 1939, tells us when we may depart from the common law, and such departure is not permitted for the reason that we might think the rule to be fallacious and anomalous."[2] *Ibid.*

The court in *Bristor II* then ruled that the common law rule of unlimited groundwater ownership constituted the controlling principle of groundwater ownership in Arizona subject to the "reasonable use rule." Under the reasonable use rule enunciated by the court (a) a landowner owns and may withdraw groundwater and use it for a useful and beneficial purpose upon the land from which it was produced, and (b) a landowner may withdraw the groundwater and convey it away from the land from which it is produced for a useful and beneficial purpose, but only if (or to the extent) the groundwater resource of other landowners in the same area is not damaged by such use. *Id.* at 237-238.

In 1960, the Arizona Supreme Court decided *State ex rel. Morrison v. Anway*, 87 Ariz. 206, 208, 349 P.2d 774. The opinion, authored by Chief Justice Struckmeyer (also the author of *Chino Valley II*), stated:

> It has been the recognized law of this state since 1904 that water filtrating or percolating through the soil beneath the surface of the land in undefined and unknown channels is a component part of the earth, having no characteristic of ownership distinct from the land itself and therefore belongs to the owner of the soil. [citing *Perrin* and *Southwest Cotton*] The rule as announced is a rule of property, and the rights acquired thereby are entitled to protection under the law.

In June, 1969, the Arizona Supreme Court issued its first of three opinions in the *Jarvis* case: *Jarvis v. State Land Department*, 104 Ariz. 527, 456 P.2d 385 (1969) ("*Jarvis I*"). Jarvis had filed an original injunction action in the Ari-

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[2] §1-106, A.C.A., 1939, now A.R.S. §1-201, is set forth in Appendix G.

zona Supreme Court seeking to enjoin the City of Tucson from withdrawing large quantities of groundwater from the Avra Valley and transporting the water 17 miles to the City to support the City's water utility business. The action also sought cancellation of Tucson's water line easement across state land.

The requested injunctive relief was granted. Justice Stuckmeyer again wrote for the court in *Jarvis I*, stating:

> In the first decision in Bristor v. Cheatham, 73 Ariz. 228, 240 P.2d 185 a majority of this court held that in Arizona the doctrine of prior appropriation applied to the use of ground water.
>
> The doctrine was bitterly assailed on rehearing and the court then in deciding that the *owners of the land had a vested property right in the water underlying unequivocally committed this state to the doctrine of reasonable use* rather than prior appropriation. Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173. The rule that the owner of land owns the water beneath the soil has been the continuous holding of this court for seventy-five years. *Id.* 104 Ariz. at 529 (citations omitted, emphasis added).

The court rejected Tucson's claim that it should be allowed to pay damages rather than be enjoined:

> .... To require petitioners and the State of Arizona to now prove damages which may result at some time in the indefinite future when the lands become marginal or wait until the ground water level has so dropped that the lands overlying are no longer productive *is unconscionable, harsh, and inequitable. The interests are too great for such a cavalier treatment of the rights here sought to be preserved. Id.* 104 Ariz. at 531 (emphasis added).

In the second Jarvis opinion, *Jarvis v. State Land Dept.*, ("Jarvis II") 106 Ariz. 506, 479 P.2d 169 (1970), the court permitted Tucson to withdraw from the Avra Valley an amount of groundwater equal to the annual maximum historical use on farm land acquired by it and retired from

irrigation, but denied any further relief, emphasizing the widespread adherence to the reasonable use doctrine by American courts by extensive citation of precedents. The court again stated that the right to pump and use groundwaters "off the lands from which they are pumped is a rule of law controlled by the doctrine of reasonable use and protected by the constitution of the state as a right in property." 106 Ariz. at 509-510.[3]

On August 22, 1976, the Arizona Supreme Court decided *Farmers Investment Co. v. Bettwy*, 113 Ariz. 520, 558 P.2d 14 (1976). Farmers Investment Co. ("Fico") owned and operated a large pecan orchard in the Upper Santa Cruz Valley. In its complaint for injunction against certain mining companies, Fico claimed that the mining companies were pumping large quantities of groundwater away from the valley for use in their mining operations in the adjoining hills. Fico alleged this usage was illegal under the *Bristor II* doctrine. The City of Tucson had intervened and certain of the mining companies crossclaimed against Tucson alleging that Tucson also had water wells in the area which it used to withdraw groundwater for use several miles away in Tucson.

The trial court denied Fico's application for an interlocutory injunction against one of the mining companies and granted summary judgment against Tucson on the mining companies' cross complaint. In reversing the lower court's refusal of Fico's request for an injunction the Arizona Supreme Court, in an opinion once again authored by Justice Struckmeyer, said:

> The question presented for decision is whether the doctrine of reasonable use as it has heretofore been

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[3] In the third *Jarvis* opinion, 113 Ariz. 230, 550 P.2d 227 (1976), the court determined that the "annual maximum historical use" was the consumptive use of groundwater thereby cutting in half the amount of groundwater Tucson could pump from the Avra Valley.

judicially determined in Arizona permits percolating waters to be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured or damaged thereby.

The principles controlling in this case have been set forth in detail and in unequivocal language by this Court in many decisions. Twenty-three years ago, on March 14, 1953, the Court published its decision on rehearing in Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953), in which it committed Arizona to the American doctrine of reasonable use. The decision emphasized that this State had adopted the principle of reasonable use 49 years before, and that whether the Court should after nearly 50 years under an announced rule depart from it depended upon many questions, the most important of which was *the protection of property rights acquired upon the faith of the Court's pronouncement of the law.* Our exact language was:

> (M)any and large investments have been made in the development of ground waters. Under these circumstances the court's announcement of the rule becomes a rule of property, ... and when a decision does become a rule of property, the rights acquired thereunder are entitled to protection under the law as declared.

Farmers Investment Co. v. Bettwy, 113 Ariz. at 525 (emphasis added).

In affirming the injunction granted by the lower court against Tucson in *Fico,* the Supreme Court brushed aside Tucson's contention that the mining companies were themselves pumping and transporting groundwater illegally and ruled that, because one of the mining companies owned 1530 acres of land "formerly cultivated" in the area, it had an interest in preserving the water supply even though it was then itself illegally depleting it. The mining company had made no claim that it proposed to use the groundwater under that acreage for any legal purpose. The court's hold-

ing therefore is supportable only on the basis that the mining company had a present vested property interest in the groundwater resource.

In 1978 in *Chino Valley v. State Land Dept.* ("*Chino Valley I*"), 119 Ariz. 243, 580 P.2d 704 (1978), (involving the same parties hereto), the Arizona Supreme Court upheld the constitutionality of a statute (Chap. 29, Laws 1977, 1st Reg. Sess., 33rd Arizona Legislature)[4] that had barred injunctive relief for certain transfers of groundwater but permitted recovery of damages. The court held that under the facts of the case, it could not conclude the remedy of damages would be inadequate. The court reserved the right to act if it appeared no remedy other than injunction would be adequate. Preliminary to this ruling the court said:

> At the outset it must be conceded that the interests which petitioners seek to protect are property rights. We recognized in Farmers Investment Company v. Bettwy, supra, that the doctrine of reasonable use as judicially determined in Arizona had become a rule of property and was entitled to protection as such. Under the doctrine of reasonable use property owners have the right to capture and use the underground water beneath their land for a beneficial purpose on that land, but no landowner can transport water off the land from which it came if the transfer injured the water supply of neighboring property owners. *Id.* at 248.

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[4] Relevant portions of this statute are reproduced in App. H. *Jarvis III* closely followed by *Farmers Investment Co. v. Bettwy* were viewed as a "real, imminent and serious threat to the state's mining industry and municipalities" which resulted in the passage of this statute. Goodman, *Arizona Goundwater Law*, 1978 Ariz. St.L.J. 205, 211. The statute permitted the continuation of transfers of groundwater by mines and cities without fear of the injunction remedy available under *Bristor II*. The 1980 Act went one step further by declaring legal these prior illegal transfers of groundwater and allowing the creation of vested ("grandfathered") rights based thereon. A.R.S. §45-462.

Finally, in the case *Matter of Determination of Conflicting Rights*, 484 F. Supp. 778, (D.C. Ariz. 1980), Judge Cordova stated without discussion that "[p]ercolating water under Arizona law is owned by the owner of the land under which it lies. *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953)." 484 F. Supp. at 783.

In light of the foregoing uniform holdings, the decision of the Arizona Supreme Court on November 30, 1981, in *Chino Valley II* is baffling as well as surprising and not predictable. Despite the long history of judicial confirmation of groundwater ownership by the owner of the soil, last reaffirmed in *Chino Valley I*, the court in *Chino Valley II* mysteriously stated:

> ... there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control .... Like wild animals free to roam as they please, they are the property of no one. 638 P.2d at 1328.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The Arizona Supreme Court, in affirming the constitutionality of the Act by the arbitrary rejection of its repeated prior committments to investors and owners of land in Arizona that their ownership rights included ownership of the groundwater beneath their land and by construing the Act as prospective in operation, plainly failed to meet the requirements of *Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930), and denied appellants due process of law. The Act itself takes property for a public use without compensation, deprives appellants of procedural due process, restrains alienation of appellants' lands, is an invalid exercise of the police power and violates appellants' equal protection rights.

1. In *Sturges v. Carter*, 114 U.S. 511 (1885), Justice Story was quoted as defining a retrospective law as follows:

> "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or

> creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Id.* 114 U.S. at 519.

This is hornbook-blackletter law and yet Justice Struckmeyer in *Chino Valley II* described the 1980 Act as a prospective statute and announced the novel rule that "[t]he doctrine of rule of property has no operation as against subsequent legislation." 638 P.2d at 1327.

The Arizona Supreme Court also relegated its previous holdings to the status of dictum, and stated "dictum thrice repeated is still dictum." *Id.* at 1327. Contrary to the court's apparent view that res judicata principles alone give rise to property rights, a property right is established by state action in holding out certain property ownership law principles as constituting established law and thereby leading its citizens to accept and rely upon such representations in property investment matters. Res judicata is not necessarily an essential ingredient in a property right. *Pease v. Peck*, 59 U.S. (18 How.) 595 (1856). A state court decision resting upon the inadequate state law ground set forth in *Chino Valley II* will not withstand federal constitutional scrutiny. *Broad River Power Co. v. South Carolina, supra.* The due process clause of the Fourteenth Amendment reaches judicial as well as legislative action. *Hughes v. Washington*, 389 U.S. 290 (1967), (Justice Stewart concurring); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930); *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 233-35 (1897). The Arizona Supreme Court cannot, by judicial fiat, destroy appellants' vested property interest in the groundwater underlying their land without running afoul of the Fourteenth Amendment. The federal questions presented by the Arizona Court's surprising and unpredictable turnabout are indeed most substantial.

2. In place of the settled ownership rights prior to June 12, 1980, the 1980 Act divides Arizona into "active management areas" and areas "outside of the active management areas". The Act arbitrarily establishes four "initial active management areas", one of which, the "Prescott initial active management area" including the "Little Chino sub-basin", came to include appellants' lands.

The Act does not describe the boundaries of these initial areas or the sub-basins included therein, nor does the Act or its legislative record identify or otherwise direct how these boundaries are to be ascertained or authorize anyone to draw them, or transmit them to the Secretary of State. Section 45-411[5] merely states that "[t]he boundaries of the initial active management areas are shown on the maps filed in the office of the Secretary of State on the effective date of this chapter." The maps, which are now on file in the office of the Arizona Secretary of State,[6] were never before the legislature when the 1980 Act was enacted nor were they before the governor when he signed the bill as approved.[7] Yet appellants' claim for injunctive relief was dismissed on the basis of the boundaries drawn on these maps (wholly without legislative direction or authorization) showing appellants' property to be within the Prescott active management area and the Little Chino sub-basin. No reason, facts, or other explanation supports this exercise of raw legislative power or this blanket authorization to un-

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[5] All citations to code sections are to codified provisions of the 1980 Act as they appear in Arizona Revised Statutes (1981) unless otherwise noted by "(as amended)", in which case the citation is to a subsequently amended provision of the Act as presently codified.

[6] Under Arizona law with the Arizona Supreme Court takes judicial notice of the records of the Office of Secretary of State and other State offices. *Jarvis v. State Land Dept.*, 104 Ariz. 527, 530, 456 P.2d 385 (1969); *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617, (1952); *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949).

[7] Examination of the Journals of the House and Senate of the Arizona Legislature (1980) discloses that these maps were not before the House, the Senate or the Governor as part of the legislative process that led to the enactment of the 1980 Act.

seen and unidentified hands to impose the harsh restrictions and partial expropriation upon appellants' lands and the lands of many others.

Regardless of whether or not one accepts the statement of the Arizona Supreme Court in *Chino Valley II* that a landowner only has the right to the usufruct of groundwater once he captures it from his land, that right itself is a property right protectable as such by the Fourteenth Amendment. Under Arizona law, that right gave a landowner sufficient interest in the resource to prevent others from illegally using water from the resource. In *Chino Valley I*, which involved the parties hereto, the Arizona Supreme Court recognized appellants' property right in the groundwater resource of the Little Chino Valley but upheld Ch. 29, Laws 1977, lst Reg. Sess., 33rd Arizona Legislature, on the basis that the statute did not deprive appellants of all existing remedies for the protection of that right against Prescott. Yet, three years later, the Court upheld the 1980 Act which, in fact, denied appellants all remedies against Prescott's invasion of the resource.

The Act included the Little Chino Valley and all of appellant's land in the same sub-basin as Prescott, and authorized Prescott to pump and transport groundwater without limitation within its "service" area within the Little Chino sub-basin. §§45-492 and 45-541(B). As shown by the "service area" map (App. I) filed with the Department of Water Resources pursuant to §45-498, Prescott's service area strikes through to the heart of the Little Chino Valley. By the 1980 Act, appellants are deprived of any right to protect the water resource of the valley against intrusions by Prescott, a right recognized by the Arizona Supreme Court in *Chino Valley I* as a property right. This is a violation of due process and presents a substantial federal question. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

The 1980 Act, in this respect, also constitutes a "taking" without compensation prohibited by the Fifth and Fourteenth Amendments. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The 1980 Act gives Prescott, a political subdivision of the State of Arizona, license to invade appellant's property interest in the resource without liability, thereby totally destroying the value of appellant's property right to exclude Prescott from the resource. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Appellant's interest in the water resource is destroyed just as surely as if Prescott owned appellant's lands. *United States v. Causby*, 328 U.S. 256, 261-2 (1946). Regardless of whether Justice Harlan's "invasion" analysis in [*Mugler v. Kansas*, 123 U.S. 623 (1887)] or Justice Holmes' "degree-of-economic-harm" analysis [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)] is used, a prohibited "taking" was effected by the 1980 Act.

3. Within active management areas established or designated under the 1980 Act withdrawal and usage of groundwater are restricted to those who can obtain "grandfathered rights" or who can qualify for certain discretionary permits issued by the state. Withdrawals from small domestic wells are not regulated. Any *withdrawal or use* of groundwater in an active management area which is not done in accordance with the requirements of the Act is made a criminal offense (§45-636), and also exposes the violator to liability for civil penalties. §45-635.

With respect to usage of groundwater for irrigation, only land legally irrigated during a five year period prior to the date of designation of the active management area may be irrigated with *any* water from *any source*, [§§45-452 (A) (as amended) and 45-452 (G)] with a limited exception for the use of Colorado River water on certain acreage. §45-452(B).

Thus any person who owns land in an active management area which had not been irrigated between 1975-1980 or who was not withdrawing groundwater from the land on June 12, 1980, is forever foreclosed from withdrawing and

using any of his own groundwater for uses on his land or elsewhere unless the Director of the Department of Water Resources (herein the "Director"), in his discretion, grants the owner a permit to pump and use his own groundwater for a nonirrigation use. §§45-511 *et seq.*

Withdrawal and use of groundwater outside of active management areas is largely unregulated by the 1980 Act except with respect to transportation of groundwater and the limitation that the use must be "reasonable and beneficial". §§45-453 and 45-544. No similar limitation is made on groundwater uses within active management areas.

The 1980 Act requires that the Director designate all "basins" and "sub-basins"[8] in the state not *established* by §45-411 and that he periodically review all areas of the state not included within the *initial* active management areas to determine if active management area status is appropriate. §§45-403 and 45-412. Subsequent active management areas may be designated if the Director determines that (a) active management practices are necessary to preserve the existing supply of groundwater for future needs; (b) land subsidence or fissuring is endangering property or potential groundwater storage capacity; or (c) use of groundwater is resulting in actual or threatened water quality degradation. §45-412. Subsequent active management areas, basins or sub-basins may be designated by the Director only after public notice and hearing at which the evidence supporting the designation must be produced and at which any person may appear and support or oppose the proposal. §§45-403, 45-404, 45-413, 45-414 and 45-417. Additionally, the Director may review the boundaries of an active management area, basin or sub-basin *designated by him*, and modify them "as conditions require and factual data justify." §45-417. *The decision to designate or modify such boundaries is subject to judicial review.* §45-405.

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[8] These terms are defined in §45-402.

In contrast to its recognition of the due process right of a landowner to question his land's inclusion within an active management area or sub-basin "designated" by the Director and to have judicial review of the director's decision, the Arizona Legislature deprived landowners within *initial* active management areas *"established"* by the 1980 Act of any such right. Persons, such as appellants, owning land within the Prescott initial active management area and the Little Chino sub-basin cannot question the inclusion of any land within such an area in an evidentiary hearing or a court proceeding. Nor is the Director given the power to act in any way with respect to the boundaries of any of the initial active management areas or sub-basins included therein. §§45-412 through 45-417. He may not even review their boundaries "as conditions require and factual data justify". §45-417. Thus, the legislature has made the *adjudicative* determination that conditions justify that appellants' lands be included within an active management area and within the same sub-basin as Prescott. At the same time, the legislature has acknowledged the *adjudicative* nature of that determination by recognizing due process rights of other landowners to challenge their inclusion in any subsequent active management area or subsequently designated sub-basin.

On June 12, 1980, landowners within the Prescott initial active management area "established" by the Act found that they no longer had the full right to pump and use their own groundwater on their land for beneficial and reasonable purposes and that many other rights which they had enjoyed as property owners under prior law were limited or voided by the Act. Without notice, hearing, or right to question the designation of, or to ascertain the justification for the inclusion of, their land in the Prescott initial active

management area and the Little Chino sub-basin, such landowners found themselves forever (subject to clemency of some future legislature) second class property owners and citizens.

4. The 1980 Act imposed a restraint on alienation of appellants' lands by making it practically impossible for appellants to subdivide and sell their land except by becoming a part of the service area of a city or town which had filed a letter of intent to contract for Central Arizona Project water.

Under the Act, a landowner who proposes to offer subdivided or unsubdivided lands for sale or lease in an active management area must obtain a "certificate of assured water supply" from the Director before seeking plat approval or authorization to sell. §45-576 (as amended). This section defines "assured water supply" as meaning that a sufficient water supply will be continuously available to meet the water needs of the proposed use for 100 years and that the projected water use is "consistent with the management plan and achievement of the management goal for the active management area".

However, a landowner within a service area (including any extensions thereof) of a city or town which has signed a letter of intent to the Director of its willingness to contract for Central Arizona Project water *for any amount* is thereby automatically exempted from the certificate requirement to the year 2001. §45-576 (as amended). The service area (but *not* any extensions thereof) of a private water company can qualify for such an exemption but only conditionally, in the Director's discretion and after a complicated examination by the Director. §45-576 (as amended). Under the stringent requirements of §45-576 (as amended) and §45-577, the subdivision of land inside an active management area is for practical purposes limited to land within service areas of favored cities and towns.

Appellants therefore have the worst of all worlds. They cannot hope to obtain a certificate of assured supply to enable them to subdivide and develop their land because of an ever increasing and continuing drop in their water table and the ever increasing demands Prescott makes upon the basin (legally permitted by the inclusion by unseen hand of Prescott within the Little Chino Valley sub-basin). At the same time they find their ability to continue farming continually jeopardized by the transportation of their groundwater to Prescott, miles away, to permit urbanization of someone else's dry land.

5. From the declaration of policy of the 1980 Act it appears that the Act has a dual purpose of remedying the withdrawal of groundwater "greatly in excess of safe annual yield" *and* prescribing the most beneficial and economically effective uses of groundwater. §45-401(A). Yet in at least two respects the Act totally ignores its stated conservation purpose. First, the Act allows for totally new uses of groundwater through its permit provisions. §§45-511 *et seq.* Generally, these permits are issued only if they can be accomodated to the conservation goal of the Act. *See, e.g.*, §45-515(A)(5). However, permits for mine dewatering or mineral extracting and processing are *required* to be issued upon a minimal showing by the person who proposes to engage in these activities. These permits are not limited as to the amount of water that may be withdrawn and must be issued without regard to the impact upon the conservation goal of the Act. *Compare* §§45-513 *and* 45-514 *with* §45-515.

Second, the Act allows cities, towns, and private water companies virtually unrestricted right to withdraw groundwater within their self-defined service areas (§45-498) for *any* use by their customers without regard to the impact of such withdrawals or uses upon the conservation goal of the

Act. §§45-492, 45-561(6) and 45-562(A). Prescott's unrestricted right to withdraw water from the Little Chino Valley adversely impacts appellants' interest in that same groundwater resource and their ability to continue farming.

The failure of these provisions to have any rational connection with the conservation goal of the Act renders the Act an unreasonable exercise of the police power and a violation of the Fourteenth Amendment.

6. Finally, in at least two respects the 1980 Act deprives appellants of equal protection of the laws in violation of the Fourteenth Amendment. First, the Act discriminates between landowners within active management areas and sub-basins established by the legislature and owners of land in the rest of the state. Owners of land outside *initial* active management areas may be subject, in the proper case, to active management or inclusion in a sub-basin *after notice, hearing and judicial review. Supra* p. 17. Once included in a *subsequent* active management area or a sub-basin therein, land may be removed from such areas "as conditions require and factual data justify". §45-417. As has been pointed out *supra* p. 18, owners of land in initial active management areas and sub-basins therein are denied these rights. There is no rational basis for this discrimination.

Secondly, the Act discriminates between persons owning land within the service area of a city, such as Prescott, which has filed a letter of intent to contract for Central Arizona Project water, and those landowners, such as many of appellants, whose lands are not within such a service area. As has been pointed out *supra* pp. 19-20, owners of dry land within Prescott's service area are permitted to subdivide and sell their land without regard to whether, in

fact, they have a 100-year supply of water.[9] §45-576(G) (as amended). Appellants, whose lands overlie the supply of water from which the owners of dry land within Prescott obtain their water, are unable to subdivide and develop their lands because they are denied the ability to obtain a certificate of assured supply by virtue of the overdraft of the resource substantially contributed to by Prescott's withdrawals. §45-576 (as amended). Here again, there is no rational basis for the discrimination.

The 1980 Act not only provides the legal mechanism by which the groundwater owned by appellants is taken from them by Prescott without payment and transferred by Prescott for sale to its customers miles distant from the land which produced the water, but also by which land within and adjacent to Prescott which is of little value for residential development because of not having a groundwater resource, becomes very valuable by reason of its access to the groundwater resource of the Little Chino Valley. This is an Act whereby private property is declared public and then given to other private citizens. No clearer case of expropriation can be made.

CONCLUSION

The federal questions presented are substantial and this Court should either summarily reverse the Arizona Supreme Court decision and judgment or grant plenary consideration of this appeal.

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[9] It is highly unlikely that Prescott will ever obtain Central Arizona Project water since it is approximately 4000 feet higher than and over 60 miles away from the delivery canal. Theoretically, Prescott may someday receive "exchange water," but practically this is a remote possibility.

RESPECTFULLY SUBMITTED this 9th day of April, 1982.

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No.

In The
Supreme Court of the United States

October Term,

TOWN OF CHINO VALLEY, et al.,
Appellants,

vs.

THE CITY OF PRESCOTT,
Appellee.

CERTIFICATE OF SERVICE

Robert B. Hoffman, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for appellants herein.

2. That the Jurisdictional Statement submitted herewith has been served upon counsel of record and the Attorney General of Arizona in accordance with the provisions of Rules 28.3 and 28.4(c) of the Rules of this Court by hand delivering three copies of the same to each of the foregoing

at his office address listed below, or to an employee therein, this 9th day of April, 1982:

Bill Stephens
Stephens & Toles
1010 East Jefferson
Phoenix, Arizona 85034

Bob Corbin
Attorney General of Arizona
State Capitol
Phoenix, Arizona 85007

3. That 28 U.S.C., Sec. 2403(b) may be applicable to this proceeding and for that reason, service has been made upon the Attorney General of the State of Arizona.

4. That the foregoing represents service on all parties required to be served under the provisions of Rule 28, Rules of the United States Supreme Court.

ROBERT B. HOFFMAN
Robert B. Hoffman

Appendix

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81-1882

Supreme Court, U.S.
FILED
APR 9 1982
ALEXANDER L. STEVAS
CLERK

No.

In The Supreme Court of the United States

October Term, 1981

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties,

Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT APPENDICES

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APPENDICES

Appendix A, opinion below A-1

Appendix B, mandate of Arizona Supreme Court .. B-1

Appendix C, order denying rehearing C-1

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Appendix E, pertinent provision of Ch. 1, Laws 1980, 4th S.S. E-1

Appendix F, motion for rehearing F-1

Appendix G, §1-201, A.R.S. (1981), formerly §1-106, A.C.A. (1939) G-1

Appendix H, pertinent provisions of Ch. 29, Laws 1977, 1st Reg. Sess. H-1

Appendix I, City of Prescott Service Area Map I-1

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In Banc

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and Edwin J. Johnson, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties, Plaintiffs-Appellants, v. THE CITY OF PRESCOTT, a municipal corporation, Defendant-Appellee.	No. 15501

Appeal from the Superior Court of Yavapai County
Cause No. 28568
Honorable Frank X. Gordon, Jr., Judge
Honorable Porter Murry, Judge

AFFIRMED

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STRUCKMEYER, Chief Justice

This appeal is from an order of the Superior Court of Yavapai County dismissing the Town of Chino Valley's complaint to enjoin the City of Prescott from withdrawing groundwater from the Granite Creek Critical Groundwater Area. Order of the Superior Court affirmed.

The Town of Chino Valley lies approximately fifteen miles north of the City of Prescott in Yavapai County, Arizona. Prescott owns 164 acres of land in the Chino Valley. In 1948, it drilled wells on some of its Chino Valley property and began transporting groundwater through a seventeen-mile pipeline to its municipal customers. In 1962, pursuant to a petition by Chino Valley residents and A.R.S. § 45-301 et seq., the State Land Department established the Granite Creek Critical Groundwater Area. On September 20, 1970, the Town was incorporated. It was within the Granite Creek Critical Groundwater Area and it owned lands and was withdrawing groundwater from the same underground basin as Prescott. Prescott, itself, was not within the Granite Creek Critical Groundwater Area.

This action was filed on August 21, 1972, seeking to enjoin the pumping of groundwater by Prescott. It did not seek damages for the unlawful pumping or transportation of groundwaters. The lawsuit proceeded at a desultory pace until the order of dismissal on November 3, 1980. Meanwhile, in 1977 the Legislature amended the Arizona Groundwater Code. The Town in 1978 brought an original action in this Court which challenged the constitutionality of the prohibitions against injunctive relief contained in the

1977 amendments. That challenge was rejected. Town of Chino Valley v. State Land Department, 119 Ariz. 243, 580 P.2d 740 (1978).

Thereafter, in June of 1980, the Legislature enacted the Groundwater Management Act, herein called the Act or the 1980 Act*. It repealed the 1977 amendments and abolished critical groundwater areas, substituting geographic units of groundwater management called Active Management Areas and Irrigation Non-Expansion Areas. Certain areas which had been declared critical groundwater areas under former laws were included in the Active Management Areas. By A.R.S. § 45-411(A)(3), the Prescott Active Management Area was established. It includes the Little Chino and Upper Agua Fria sub-basins. Both the Town of Chino Valley and Prescott are within the Little Chino Sub-basin of the Prescott Active Management Area.

By A.R.S. § 45-541(A) of the 1980 Act, transportation of groundwater is allowed within a sub-basin of an Active Management Area. Prescott, being within the Little Chino Sub-basin from which it was drawing water, moved for dismissal of the Town's complaint for injunctive relief. The Superior Court granted Prescott's motion, but ordered that the Town have twenty days in which to file an amended complaint specifying any damages. The Town's appeal from that portion of the trial court's order dismissing appellants' claim for injunctive relief is based upon the asserted unconstitutionality of the Act of 1980 since the Act, by permitting the transportation of groundwater, legitimatizes the prospective withdrawal of groundwater from the Little Chino Sub-basin by Prescott. Appellants' principal attack is that the Act takes property without due process of law and without just compensation. The Act is also challenged on the grounds that it is a legislative encroachment on judicial powers and that it violates art. 5, part 2, § 13 of the Arizona Constitution in that there are provisions in the Act of 1980 which were not included in the title of the Act.

By the Constitution of Arizona, art. 17, § 1, effective at statehood in 1912, it was provided that the common law doctrine of riparian water rights "shall not obtain or be of any force or effect in the State." *See* Brasher v. Gibson, 101 Ariz. 326, 330, 419 P.2d 505, 509 (1966). Thereafter, in 1919, the Arizona Legislature provided that the water of all sources falling in streams, canyons, ravines, natural channels or definite underground channels belonged to the public and were subject to appropriation for beneficial use. Waters percolating beneath the soil were not included among those subject to appropriation. Appellants rely on the cases of Howard v. Perrin, 8 Ariz. 347, 76 P. 460 (1904), and Maricopa County Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), for their basic proposition that they own the water percolating beneath their lands under the doctrine of reasonable use.

The Territorial Supreme Court, in Howard v. Perrin, commented:

> "Throughout the Pacific Coast, where the doctrine of appropriation obtains, the decisions are uniform to the effect that waters percolating generally through the soil beneath the surface are the property of the owner of the soil * * *." 8 Ariz. at 353, 76 P. at 462.

Howard v. Perrin was a case in which Howard's grantor went upon unsurveyed lands and sank a well, developing a flow of water which he conducted to some water troughs and a reservoir. About six years later, Howard posted a notice that he had appropriated water from a definite underground channel pursuant to the Laws of 1893, Act 86. The issue was whether the waters which Howard claimed to have appropirated were in a definite underground channel or, as the court said: "constituted a running stream flowing in natural channels between well-defined banks * * *." 8 Ariz. at 353, 76 P. at 462. It was held that Howard, having alleged an appropriable subterranean stream, had the burden of proof to establish that fact by competent evidence. The court said it failed "to find sufficient evidence in the

testimony of the witnesses * * * to establish the existence of 'a subterranean stream with well-defined channels or banks,' * * *." *Id.* at 354, 76 P. at 463. Palpably the statement that waters percolating through the soil beneath the surface are the property of the owner of the soil is dictum.

Maricopa County Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), was also a case in which it was determined that the proof did not establish an underground stream so as to permit appropriation of water. The court cited to Howard v. Perrin, saying:

> "[A]nd therein we held that waters percolating generally through the soil are the property of the owner * * *.
>
> * * * Whether such statement was, strictly speaking, *dicta* or not, it has been accepted as the law of this jurisdiction for so long, and so many rights have been based on it, that only the clearest showing that the rule declared was error would justify us in departing from it." *Id.* at 82-83, 4 P.2d at 375-76.

The Town of Chino Valley relies on the two foregoing cited cases, but there are others in which the statement first made in Howard v. Perrin was repeated, although there was at no time, according to the way we read the cases, an arguable issue as to the precise nature of the right which the owner of the overlying lands had to the waters beneath. See Fourzan v. Curtis, 43 Ariz. 140, 147, 29 P.2d 722, 725 (1934); Gross v. MacCornack, 75 Ariz. 243, 248, 255 P.2d 183, 186 (1953); State v. Anway, 87 Ariz. 206, 208, 349 P.2d 774, 775 (1960).

Dictum thrice repeated is still dictum. It is a court's statement on a question not necessarily involved in the case and, hence, is without force of adjudication. Garvey v. Trew, 64 Ariz. 342, 350, 170 P.2d 845, 850 (1946). It is not controlling as precedent. Knight v. State, 273 Ala. 480, 486, 142 So.2d 899, 905 (1962); Sharkiewicz v. Smith, 142 Conn. 410, 412, 114 A.2d 691, 692 (1955). We therefore hold that

the statement first made in Howard v. Perrin and reiterated under circumstances where the exact nature of the overlying owner's rights to the water beneath his property were not in question is not precedent for the decision in this case.

In 1952, in Bristor v. Cheatham, 73 Ariz. 228, 240 P.2d 185, a majority of this Court held that waters percolating beneath the surface of the land were subject to appropriation. On rehearing, however, one new judge having been elected and one judge having changed his position, it was held that groundwater was not subject to appropriation. The majority said:

> "[M]any and large investments have been made in the development of ground waters. Under these circumstances the court's announcement of the rule becomes a rule of property * * *." 75 Ariz. 227, 231, 255 P.2d 173, 175 (1953).

In 1970, in Jarvis v. State Land Department, 106 Ariz. 506, 479 P.2d 169, we said:

> "The right to exhaust the common supply by transporting water for use off the lands from which they are pumped is a rule of law controlled by the doctrine of reasonable use and protected by the constitution of the state as a right in property." 106 Ariz. at 509-10, 479 P.2d at 172-73.

The statements in *Bristor* and *Jarvis* do not mean that rights to the use of groundwaters cannot be modified prospectively by the Legislature. They only mean that courts will adhere to an announced rule to protect rights acquired under it and that if any change in the law is necessary, it should be made by the Legislature. Stewart v. Stewart, 199 Cal. 318, 341, 249 P. 197-207 (1926); Madfes v. Beverly Development Corp., 251 N.Y. 12, 18, 166 N.E. 787, 789 (1929). The doctrine of rule of property has no operation as against subsequent legislation. Bryan v. W. T. Smith Lumber Co., 278 Ala. 538, 543, 179 So.2d 287, 292 (1965); St. Martin Land Co. v. Pinckney, 212 La. 605 618, 33 So.2d

169, 173 (1947); Nice Ball Bearing Co. v. Mortgage Building & Loan Association, 310 Pa. 560, 566, 166 A. 239, 241 (1933).

We therefore hold that since the Act of 1980 is prospective in application, it is not a legislative encroachment on judicial powers.

Appellants urge that the 1980 Act denies them due process of law and just compensation. The question therefore is, what are a landowner's rights in the water percolating under his lands?

In our recent case of Town of Chino Valley v. State Land Dept., 119 Ariz. 243, 580 P.2d 704 (1978), we said:

> "Under the doctrine of reasonable use property owners have the right to capture and use the underground water beneath their land for a beneficial purpose on that land * * *." *Id.* at 248, 580 P.2d at 709.

This statement we think is supported by the better reasoned decisions in this country. In the absolute sense, there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control by the person claiming them because of their migratory character. Like wild animals free to roam as they please, they are the property of no one.

In Knight v. Grimes, 127 N.W.2d 708, 711 (S.D. 1964), the court noted that Sourth Dakota is largely a semi-arid state and that the legislature was fully justified in finding the public welfare required the maximum protection and utilization of its water supply. It said:

> "The notion that this right to take and use percolating water constitutes an actual ownership of the water prior to withdrawal has been demonstrated to be legally fallacious. Bassett v. Salisbury Mfg. Co., 1862, 43 N.H. 569, 82 Am.Dec. 179; Katz v. Walkingshaw, 1902,

141 Cal. 116, 70 P. 663, 64 L.R.A. 236; Ohio Oil Company v. Indiana, 1900, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729."

In the recent case of Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 666-67 (Fla.), *cert. denied*, 444 U.S. 965, ___ S. Ct. ___ (1979), it was held:

"Ancient law gave no special consideration to ground water, treating all water like the air, the sea, and wild animals, as the property of no one or the property of everyone. Telease, *Government Ownership and Trusteeship of Water*, 45 Calif. Law Review, 638, 640 (1957).

* * * * *

The common-law concept of absolute ownership of percolating water while it is in one's land gave him the right to abstract from his land all the water he could find there. On the other hand, it afforded him no protection against the acts of his neighbors who, by pumping on their own land, managed to draw out of his land all the water it contained. Thus the term 'ownership' as applied to percolating water never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself.

* * * * *

The right of the owner to ground water underlying his land is to the usufruct of the water and not to the water itself."

We therefore hold that there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water.

This brings us to conclude that appellants' position that the 1980 Act violates the Fifth and Fourteenth Amendments to the Constitution of the United States and art. 2, § 17 of the Constitution of the State of Arizona as a taking of private property without due process of law and just compensation cannot be sustained.

The Legislature, in Ch. 2 of the 1980 Act, A.R.S. § 45-401, declared:

> "A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.
>
> B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state."

We do not doubt but that the overdraft of groundwater in this state is a serious problem which has no chance of correcting itself, and that it is necessary for comprehensive legislation to both limit groundwater use and allocate its use among competing interests.

More than twenty-five years ago, this court decided that the Legislature might choose between competing interests where the supply of groundwater was limited. In Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955), we said in holding constitutional the groundwater act of 1948:

> "The legislative finding that the exhaustion of ground water by excessive withdrawals threatens to destroy one of the principal economic resources of the state to the consequential serious injury of all is not disputed. Such a conclusion is obviously justified because unrestrained use must inevitably result either in complete exhaustion of the state's ground water so that in the end the lands dependent thereon will revert to their desert state or in the lowering of water tables so that the increased cost of pumping will reduce these lands to a marginal or submarginal condition." *Id.* at 408-09, 291 P.2d at 768 (footnote omitted).

We held that there was a preponderant public interest in the preservation of lands then in cultivation as against lands potentially reclaimable "and that where as here the choice is unavoidable because a supply of water is not available for both, we cannot say that the exercise of such choice, controlled by considerations of social policy which are not unreasonable, involves a denial of due process." *Id.* at 410, 291 P.2d at 769. The Legislature in the Act of 1980 again recognized that the supply of groundwater is limited and again exercised a choice for the preservation and use of groundwater.

Legislation which denies or restricts rights to use property necessarily results in a diminution of that property's value. Yet the United States Supreme Court has on numerous occasions upheld under the state's police power regulations of land use which have virtually destroyed private interests. Most recently, in Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), it was held that a zoning ordinance restricting the use of a five-acre tract of land to single family residences would not ef-

fect a taking of property without compensation. The city ordinance was found to further the legitimate state interest of protecting the residents of the city from the ill effects of urbanization. *Id* at ___, 100 S.Ct. at 2142, 65 L.Ed. at ___. In the present case, appellants may make such use of their property as they choose, except that their lands may not be irrigated if they were not legally irrigated in the last five years. The 1980 Act furthers legitimate state interests.

Legislatures of various states have from time to time abolished the prevailing uses of groundwater and substituted other plans for its use. State courts have uniformly rejected the idea that groundwater percolating through the soil may not be limited and regulated and must be acquired by eminent domain. Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla.), *cert. denied*, 444 U.S. 965, ___ S.Ct. ___ (1979); Williams v. Wichita, 190 Kan. 317, 340-41, 374 P.2d 578, 595-96 (1962), *cert. denied*, 375 U.S. 7, 84 S.Ct. 46, 11 L.Ed.2d 38 (1963); Crookston Cattle Co. v. Minnesota Department of Natural Resources, 300 N.W.2d 769, 774 (Minn. 1980); Baeth v. Hoisveen, 157 N.W.2d 728, 733 (N.D. 1968); Knight v. Grimes, 80 S.D. 517, 523-27, 127 N.W.2d 708, 711-14 (1964).

> "Like zoning legislation, legislation which limits or regulates the right to use underlying water is permissible. * * * Where regulation operates to arbitrate between competing public and private land uses, however, as does the water priority statute in this case, such legislation is upheld even where the value of the property declines significantly as a result." Crookston Cattle Co. v. Minnesota Department of Natural Resources, 300 N.W.2d at 774 (citation omitted).

We hold that the Act of 1980 does not deny appellants due process of law and does not require that they be paid compensation for any possible diminution of their rights which they may have had under the doctrine of reasonable use.

Appellants argue that the 1980 Act is unconstitutional because it contains provisions not included in its title, which is forbidden by art. 4, part 2, § 13 of the Arizona Constitution. In the Session Laws of 1980, the title of the 1980 Act consists of approximately two and one-half printed pages. We have said:

> "[I]t is not necessary that the title be a synopsis or a complete index of the legislation that is to follow; that a title is invulnerable when it is sufficiently full and comprehensive as to indicate, in a general way at least, what is to follow in the way of legislation; that it should not be so meagre as to mislead or tend to avert inquiry as to the context thereof, and it is sufficient if the provisions of the Act relate directly or indirectly to the subject expressed in the title and have a natural connection therewith and not foreign thereto; and '* * * "the title is sufficient if it is not productive of surprise and fraud, and is not calculated to mislead the legislature or the people, but is of such character as fairly to apprise legislators, and the public in general, of the subject matter of the legislation, and of the interests that are or may be affected thereby, *and to put anyone having an interest in the subject matter on inquiry*." ' " Dennis v. Jordan, 71 Ariz. 430, 439, 229 P.2d 692, 697-98 (1951) (emphasis in original).

The title of the 1980 Act in part provides:

> "An Act relating to waters; providing for the management of groundwater; * * * prescribing conditions on the withdrawal and use of groundwater in active management areas and irrigation non-expansion areas; * * * prescribing the determination of rights to withdraw and use groundwater; prescribing the use, nature of and conditions and limitations on groundwater rights; * * * prescribing rights of cities, towns, private water companies and others to withdraw and supply groundwater * * *." Groundwater Management Act, 1980 Ariz. Sess. Laws 4th Spec. Sess. 1339.

A cursory examination of the title fairly apprises the reader of the subject matter of the legislation and the interests which are or may be affected. It puts the reader on notice that the groundwater rights of all persons and entities in the State will be significantly affected by the Act and puts anyone interested in the subject matter on inquiry. More than this is not required. We hold that the 1980 Act does not contain provisions which are not reasonably related to or included in its title.

Many and varied interests are affected by the 1980 Act. These interests are apparent in the briefs which amici curiae have filed. We express our appreciation for their excellence and the assistance which they have given the Court. Some matters have been raised and argued which were not addressed by the parties. As to these, it is the rule that amici curiae are not permitted to create, extend, or enlarge issues beyond those raised and argued by the parties. City of Tempe v. Prudential Insurance Company of America, 109 Ariz. 429, 510 P.2d 745 (1973). And see the second *Bristor* opinion, 75 Ariz. 227, 230, 255 P.2d 173, 175 (1953), where the Court commented:

> "It was never alleged in the complaint nor contended by the plaintiffs in assignment of error or briefs that they had appropriated percolating water. This issue was apparently introduced into the case by amici curiae who have no right to create, extend or enlarge the issues."

This Court will only decide issues raised and argued by the parties.

The order of the court below is affirmed.

FRED C. STRUCKMEYER, JR.
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN, Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

BEN C. BIRDSALL, Judge
Court of Appeals, Division Two

Note: Justice Frank X. Gordon, Jr. having announced his disqualification from any participation in this matter, The Honorable Ben C. Birdsall, Judge, Court of Appeals, Division Two was asked to sit in his stead.

*

The 1980 Act provided for the establishment of Active Management Areas which are geographical areas where groundwater supplies are imperiled. A.R.S §§ 45-411 to -637. Active Management Areas encompass a whole groundwater basin or basins. A.R.S. § 45-412(B). Groundwater basins are areas designated as enclosing a relatively hydrologically distinct body or related bodies of groundwater.

A.R.S. § 45-402(10). Groundwater sub-basins are areas designated so to enclose a smaller hydrologically distinct body of groundwater found within a groundwater basin. A.R.S. § 45-402(25).

The 1980 Act provides limitations on use of groundwater in Active Management Areas. In general the Act restricts new uses of water drawn from Active Management Areas. The Act sets up a system of determining grandfathered rights to use groundwater in Active Management Areas, A.R.S. §§ 45-461 to -482, defining certain usages of groundwater previously being made and allowing these usages to continue. A.R.S. § 45-462. The Act also establishes the rights of cities, towns, private water companies and irrigation districts in Active Management Areas to withdraw as much groundwater as is needed from within their service areas to serve their customers although restrictions are provided on extensions of service areas and the types of service that may be provided by these entities. A.R.S. § 45-491. The Act also specifies a few other new uses of groundwater that may be made in Active Management Areas. It allows limited new withdrawals for domestic purposes. A.R.S. § 45-454. It also sets up a system for obtaining permits to withdraw new amounts of water for certain specific purposes. A.R.S. §§ 45-511 to -528.

Provided withdrawal is permitted under any of the provisions of the Act, transportation of groundwater within the same sub-basin may be made without payment of damages. A.R.S. § 45-541. Transportation of groundwater between sub-basins or away from Active Management Areas is also authorized if the groundwater is allowed to be withdrawn under the Act's provisions, but damages must be paid for any injury caused. A.R.S. §§ 45-542, -543. Rules for determining damage are set out in A.R.S. § 45-545. The

transportation rules apply whether in or outside of Active Management Areas, A.R.S. § 45-544, although the restrictions on new uses of groundwater do not apply outside of Active Management Areas. A.R.S. § 45-453.

The Act provides for conservation for all uses of groundwater in Active Management Areas. A.R.S. §§ 45-561 to -579. The Act ends with provisions governing the drilling and registering of wells for withdrawing groundwater, A.R.S. §§ 45-591 to -604, and financial and enforcement provisions to carry out the legislation, A.R.S. §§ 45-611 to -615, -631 to -637.

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties, Plaintiffs-Appellants, vs. THE CITY OF PRESCOTT, a municipal corporation, Defendant-Appellee.	No. 15501

MANDATE

TO: The Honorable Superior Court for Yavapai County, Arizona, in relation to Cause No. 28568.

GREETINGS:

The above cause was presented in your Court and was brought before the Court of Appeals, Division One, No. 1 CA-CIV 5728, in the manner prescribed by law. By Order dated the 2nd day of June, 1981, this cause was transferred to the Supreme Court. This Court rendered its Opinion and caused the same to be filed on the 30th day of November, 1981.

A Motion for Rehearing was timely filed and was denied by Order of this Court on the 15th day of January, 1982.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the Opinion of this Court, a copy of the Opinion being attached hereto.

WITNESS, THE HONORABLE WILLIAM A. HOLOHAN, Chief Justice of the Supreme Court of the State of Arizona, this 18th day of January, 1982.

S. ALAN COOK, Clerk

The original of the foregoing MANDATE and copy of the Opinion of this Court were mailed to the Clerk of the Superior Court for Yavapai County, Arizona, this 18th day of January, 1982. A copy of the MANDATE was mailed on said day to Frank J. Barry, Esq.; Mark Wilmer, Esq. of Snell & Wilmer; Bill Stephens, Esq. and Carol Benyi, Esq. of Stephens & Toles; Calvin H. Udall, Esq. and James Johnson, Esq., of Fennemore, Craig, von Ammon & Udall; Kathy Ferris, Chief Counsel and Scott D. Larmore, Deputy, of Department of Water Resources; Thomas Chandler, Esq., Robert E. Lundquist, Esq. and Steven Weatherspoon, Esq., of Chandler, Tullar, Udall & Redhair; Herbert L. Ely, Esq. of Ely, Bettini & Ulman; Joseph P. Ralston, Esq. and Michael J. Brophy, Esq. of Ryley, Carlock & Ralston; John P. Frank, Esq. and Tom Galbraith, Esq., of Lewis & Roca; Gerald G. Kelly, Esq. of Musick, Peeler & Garrett; Robert O. Lesher, Esq. of Lesher, Kimble, Clausen & Gothreau; William D. Baker, Esq., Robert S. Lynch, Esq. and Paul R. Orme, Esq. of Ellis & Baker; Burton M. Apker, Esq. of Evans, Kitchell & Jenckes; Hon. Paul G. Rosenblatt, Presiding Judge of Yavapai County; Glen D. Clark, Clerk, Court of Appeals, Division One.

S. ALAN COOK, Clerk

SUPREME COURT
STATE OF ARIZONA

January 15, 1982

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties, Plaintiffs-Appellants, vs. THE CITY OF PRESCOTT, a municipal corporation, Defendant-Appellee.	Supreme Court No. 15501 Court of Appeals No. 1 CA-CIV 5728 Yavapai County No. 28568

The following action was taken by the Supreme Court of the State of Arizona on January 15, 1982 in regard to the above-entitled cause:

"ORDERED: Motion to Amend Opinion and Judgment = DENIED.

FURTHER ORDERED: Motion for Rehearing = DENIED.

FURTHER ORDERED: Request That Mandate Be Stayed = DENIED."

Mandate enclosed herewith.

S. ALAN COOK, Clerk

By /s/ ANNA L. CATES
Chief Deputy Clerk

TO:

Frank J. Barry, Esq., 548 East Speedway, Tucson, Arizona 85705

Mark Wilmer, Esq., Snell & Wilmer, 3100 Valley Bank Center, Phoenix, Arizona 85073

Bill Stephens, Esq. and Carol Benyi, Esq., Stephens & Toles, 1010 East Jefferson, Phoenix, Arizona 85034

Calvin H. Udall, Esq. and James W. Johnson, Esq., Fennemore, Craig, von Ammon & Udall, 100 West Washington, Suite 1700, Phoenix, Arizona 85003

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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In Banc

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties, Appellants, vs. THE CITY OF PRESCOTT, a municipal corporation, Appellee.	No. 15501 AMENDED NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT AND CERTIFICATE OF SERVICE

Notice is hereby given that Town of Chino Valley, a municipal corporation, and Tom M. Sullivan, William J. Wells, and Edwin J. Johnson, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named parties, the Appellants above named, pursuant to the provisions of 28 U.S.C., Sec. 1257(2), hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arizona affirming the dismissal of the complaint, said judgment entered November 30, 1981; and

These Appellants also appeal to the Supreme Court of the United States from the denial of these parties' Motion for Rehearing including the denial and rejection thereby of their claim that the decision and judgment of said Court entered November 30, 1981, contravened the Fifth and the Fourteenth Amendments to the United States Constitution.

DATED this 9th day of February, 1982.

Frank J. Barry
548 East Speedway
Tucson, Arizona 85705

Mark Wilmer
Snell & Wilmer
3100 Valley Bank Center
Phoenix, Arizona 85073

By: /s/ MARK WILMER
Attorneys for Appellants

CERTIFICATE OF SERVICE

Mark Wilmer certifies:

That he is a member in good standing of the bar of the United States Supreme Court;

That he deposited a true copy of the above Amended Notice of Appeal to be filed in the office of the Clerk of the Superior Court in and for the County of Yavapai, Prescott, Arizona; and a true copy of the Amended Notice of Appeal to be filed in the office of the Clerk of the Supreme Court of Arizona, Phoenix, Arizona, in an envelope properly addressed to Stephens & Toles, P.C., Attorneys at Law, 1010 East Jefferson Street, Phoenix, Arizona 85034, to the attention of Bill Stephens and Carol Benyi, attorneys for the City of Prescott, Arizona, the Appellee in said Amended Notice of Appeal, and deposited the said envelope in the United States mail, postage prepaid, on February 9, 1982; and that therefore all parties required to be served have been served.

Dated this 9th day of February, 1982.

/s/ MARK WILMER
Mark Wilmer

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties, Plaintiffs-Appellants, vs. THE CITY OF PRESCOTT, a municipal corporation, Defendant-Appellee.	No. 28568 AMENDED NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT AND CERTIFICATE OF SERVICE

Notice is hereby given that Town of Chino Valley, a municipal corporation, and Tom M. Sullivan, William J. Wells, and Edwin J. Johnson, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named parties, the Plaintiffs-Appellants above named, pursuant to the provisions of 28 U.S.C., Sec. 1257(2), hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arizona affirming the dismissal of the complaint, said judgment entered November 30, 1981; and

These Plaintiffs-Appellants also appeal to the Supreme Court of the United States from the denial of these parties' Motion for Rehearing including the denial and rejection thereby of their claim that the decision and judgment of said Court entered November 30, 1981, contravened the Fifth and the Fourteenth Amendments to the United States Constitution.

Dated this 9th day of February, 1982.

Frank J. Barry
548 East Speedway
Tucson, Arizona 85705

Mark Wilmer
Snell & Wilmer
3100 Valley Bank Center
Phoenix, Arizona 85073

By: /s/ MARK WILMER
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

Mark Wilmer certifies:

That he is a member in good standing of the bar of the United States Supreme Court;

That he deposited a true copy of the above Amended Notice of Appeal to be filed in the office of the Clerk of the Superior Court in and for the County of Yavapai, Prescott, Arizona; and a true copy of the Amended Notice of Appeal to be filed in the office of the Clerk of the Supreme Court of Arizona, Phoenix, Arizona, in an envelope properly addressed to Stephens & Toles, P.C., Attorneys at Law, 1010 East Jefferson Street, Phoenix, Arizona 85034, to the attention of Bill Stephens and Carol Benyi, attorneys for the City of Prescott, Arizona, the Defendant-Appellee in said Amended Notice of Appeal, and deposited the said envelope in the United States mail, postage prepaid, on February 9, 1981; and that therefore all parties required to be served have been served.

Dated this 9th day of February, 1982.

/s/ MARK WILMER
Mark Wilmer

PERTINENT PROVISIONS OF CHAPTER ONE, LAWS OF 1980, 4TH SPECIAL SESSION, 34TH ARIZONA LEGISLATURE AS CODIFIED.*

Article 1. Administration.

§ 45-401. Declaration of policy

A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stablilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

§ 45-402. Definitions

* * * * *

2. "Active management area" means a geographical area which has been designated pursuant to article 2 of this chapter as requiring active management of groundwater.

* * * * *

N.b. Subsequent amendments to codified portions of this act are indicated.

10. "Farm unit" means one or more farms irrigated with groundwater which are contiguous or in proximity to each other with similar soil conditions, crops and cropping patterns.

11. "Grandfathered right" means a right to withdraw and use groundwater pursuant to article 5 of this chapter based on the fact of lawful withdrawals and use of groundwater prior to the date of the designation of an active management area.

12. "Groundwater basin" means an area which, as nearly as known facts permit as determined by the director pursuant to this chapter, may be designated so as to enclose a relatively hydrologically distinct body or related bodies of groundwater, which shall be described horizontally by surface description.

13. "Initial active management area" means the Tucson, Phoenix, Prescott or Pinal active management area established by § 45-411.

* * * * *

17. "Irrigation grandfathered right" means a grandfathered right determined pursuant to § 45-465.

* * * * *

20. "Irrigation water duty" or "water duty" means the amount of water in acre-feet per acre that is reasonable to apply to irrigated land in a farm unit during the accounting period, as determined by the director pursuant to §§ 45-564 through 45-568.

21. "Non-irrigation grandfathered right" means a grandfathered right determined pursuant to § 45-463, 45-464, 45-469 or 45-472.

22. "Non-irrigation use" means a use of groundwater other than an irrigation use.

* * * * *

24. "Private water company" means any entity which distributes or sells groundwater, except a political subdivision or an entity established pursuant to this title which is not regulated as a public service corporation by the Arizona corporation commission under a certificate of public convenience and necessity. A city or town is not a private water company.

25. "Service area" means:

(a) With respect to a city or town, the area of land actually being served water by the city or town plus:

(i) Additions to such area which contain an operating distribution system owned by the city or town primarily for the delivery of non-irrigation water.

(ii) The service area of a city, town or private water company that obtains its water from the city pursuant to a contract entered into prior to the date of the designation of the active management area.

(b) With respect to a private water company, the area of land of the private water company actually being served water by the private water company plus additions to such area which contain an operating distribution system owned by the private water company primarily for the delivery of non-irrigation water.

* * * * *

27. "Sub-basin" means an area which, as nearly as known facts permit as determined by the director pursuant to this chapter, may be designated so as to enclose a relatively hydrologically distinct body groundwater within a groundwater basin, which shall be described horizontally by surface description.

28. "Subsequent active management area" means an active management area established after June 12, 1980 pursuant to article 2 of this chapter.

* * * * *

31. "Type 1 non-irrigation grandfathered right" means a non-irrigation grandfathered right associated with retired irrigated land and determined pursuant to § 45-463, 45-469 or 45-472.

32. "Type 2 non-irrigation grandfathered right" means a non-irrigation grandfathered right not associated with retired irrigated land and determined pursuant to § 45-464.

* * * * *

§ 45-403. Designation of groundwater basins and sub-basins; hearing

A. Within eighteen months of the effective date of this section, the director shall propose boundaries for all groundwater basins and sub-basins of groundwater basins in this state not included within initial active management areas established pursuant to § 45-411.

B. Within twenty-four months of the effective date of this section, the director shall hold public hearings to consider the final boundaries of groundwater basins and sub-basins in this state not included within initial active management areas established pursuant to § 45-411. The director shall give reasonable notice of the hearing appropriate to the circumstances which shall include the publication once each week for two consecutive weeks in a newspaper of general circulation in each county in which the proposed groundwater basin is located. Any notice shall contain the time and place of the hearing, the legal description and a map clearly identifying and describing all lands to be included in the proposed groundwater basin and any sub-basin and any other information the director deems necessary.

C. The hearings shall be held at the county seat of the county in which the major portion of the land in the proposed groundwater basin is located as soon as practicable but no less than thirty days and no more than sixty days after the first publication of the notice of the hearing. At the hearing, the director shall present the factual data in

his possession in support of the proposed action. Any person may appear at the hearing, either in person or by representative, and submit oral or documentary evidence for or against the proposed action. In making his determination, the director shall give full consideration to public comment and to recommendations made by local political subdivisions.

§ 45-404. Findings upon hearing; maps; order for boundaries of groundwater basin; review and modification of boundaries

A. Within sixty days after the hearing, the director shall make and file in his office written findings with respect to matters considered during the hearing. For each groundwater basin, the director shall prepare and file in his office:

1. A map clearly identifying all lands included within the groundwater basin and its sub-basins.

2. Factual data justifying the boundaries of the groundwater basin and its sub-basins.

3. An order designating the boundaries of each groundwater basin and its sub-basins.

B. The findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing and the order is effective when published for the final time. The materials required by subsection A of this section and a transcript of the hearing are public records of the deparment and shall be available for examination by the public during regular business hours.

C. The director shall file a true copy of the map in the office of the county recorder of the county or counties in which the groundwater basin is located.

D. The director may, as conditions require and factual data justify, review and modify the boundaries of any groundwater basin or any sub-basin of a groundwater basin except for groundwater basins and sub-basins of a ground-

water basin that are included within an initial active management area. The review and modification of boundaries of a groundwater basin or sub-basin included within a subsequent active management area or irrigation non-expansion area shall follow procedures set forth in §§ 45-417 and 45-438. Any modification of boundaries designated pursuant to this article shall follow as closely as practicable the procedural requirements of § 45-403 and this section.

§ 45-405. Rehearing; appeals from decisions of the director; assignment of appeals

A. The director shall, by regulation, provide an opportunity for rehearing or review of any decision of the director.

B. Except as otherwise provided in this chapter, appeals from a decision of the director shall be conducted pursuant to title 12, chapter 7, article 6 and shall extend to all questions of law and fact presented by the record.

* * * * *

§ 45-407. Stay of director's decision; precedence of appeals; review by the court of appeals

* * * * *

C. The final decision of the superior court is appealable in the same manner as in civil actions generally and shall be governed by the rules of appellate procedure.

* * * * *

Article 2. Active Management Areas

§ 45-411. Initial active management areas; maps

A. Four initial active management areas are established on the effective date of this section. The four initial active management areas are:

1. The Tucson active management area which includes the upper Santa Cruz and Avra valley sub-basins.

2. The Phoenix active management area which includes the east Salt river valley, west Salt river valley, Fountain hills, Carefree, lake Pleasant, Rainbow valley and Hassayampa sub-basins.

3. The Prescott active management area which includes the little Chino and upper Agua Fria sub-basins.

4. The Pinal active management area which includes the Maricopa-Stanfield, Eloy, Aguirre valley, Santa Rosa valley and Vekol valley sub-basins.

B. The boundaries of the initial active management areas are shown on the maps filed in the office of the secretary of state on the effective date of this chapter.

C. A true copy of the maps identifying the initial active management areas shall be on file in the department and shall be available for examination by the public during regular business hours. A true copy of the map of each initial active management area shall also be filed in the office of the county recorder of the county or counties in which the active management area is located.

§ 45-412. Subsequent active management areas; criteria; review of groundwater basins not subject to active management

A. The director may designate an area which is not included within an initial active management area, pursuant to § 45-411, as a subsequent active management area if the director determines that any of the following exists:

1. Active management practices are necessary to preserve the existing supply of groundwater for future needs.

2. Land subsidence or fissuring is endangering property or potential groundwater storage capacity.

3. Use of groundwater is resulting in actual or threatened water quality degradation.

B. An active management area designated pursuant to this section may include more than one groundwater basin but shall not be smaller than a groundwater basin or include only a portion of a groundwater basin, except for the regional aquifer systems of northern Arizona.

C. The director shall periodically review all areas which are not included within an active management area to determine whether such areas meet any of the criteria for active management areas as prescribed in this section.

§ 45-413. Hearing on designation of subsequent active management areas and boundaries; notice; procedures

A. If the director proposes to designate a subsequent active management area pursuant to § 45-412, subsection A, the director shall hold a public hearing to consider:

1. Whether to issue an order declaring the area an active management area.

2. The boundaries and any sub-basins of the proposed active management area.

B. The director shall give reasonable notice of the hearing under the circumstances which shall include publication once each week for two consecutive weeks in a newspaper of general circulation in each county in which the proposed active management area is located. Any notice shall contain the time and place of the heairng, the legal description and a map clearly identifying and describing all lands to be included in the proposed active management area and any sub-basins and any other information the director deems necessary.

C. The hearing shall be held at a location within the proposed active management area as soon as practicable but no less than thirty days and no more than sixty days after the first publication of the notice of hearing. At the hearing, the director shall present the factual data in his possession in support of the proposed action. Any person may appear at the hearing, either in person or by representative, and

submit oral or documentary evidence for or against the proposed action. In making his determination, the director shall give full consideration to public comment and to recommendations made by local political subdivisions.

§ 45-414. Findings upon hearing; order for active management area; publication

A. Within thirty days after the hearing, the director shall make and file in his office written findings with respect to matters considered during the hearing. If the director decides to declare an area an active management area, the director shall make and file an order designating the active management area.

B. The findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing, and the order is effective when published for the final time. All factual data compiled by the director, a transcript of the hearing, a copy of the findings and a map identifying the lands included in the active management area are public records of the department and shall be available for examination by the public during regular business hours.

C. The director shall file a true copy of the map in the office of the county recorder of the county or counties in which the active management area is located.

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§ 45-417. Review and modification boundaries of subsequent active management area

A. The director may review and modify the boundaries of a subsequent active management area or any of its sub-basins as conditions require and factual data justify.

B. The director shall review the boundaries of a subsequent active management area or any of its sub-basins upon receipt of a petition signed by persons who together

withdraw not less than one-fourth of the groundwater withdrawn in the active management area or by request of the groundwater users advisory council in the active management area.

C. Before modifying the boundaries of a subsequent active management area or any of its sub-basins the director shall give notice of and hold a hearing on the proposed modifications pursuant to the procedures prescribed by § 45-413. After the hearing, the director shall prepare written findings pursuant to § 45-414.

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Article 4. Groundwater Rights and Uses in General

§ 45-451. Groundwater rights and uses in active management areas

A. In an active management area, a person may withdraw and use groundwater only in accordance with the provisions of article 5 through 12 of this chapter.

B. This chapter shall not be construed to affect decreed and appropriative water rights.

§ 45-452. No new irrigated acreage in active management areas; central Arizona project water; agricultural experimentation; definition

A. In an initial active management area, except as provided in subsections B and H of this section, only acres of land which were legally irrigated at any time from January 1, 1975 through January 1, 1980, which are capable of being irrigated, which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469 and for which the irrigation grandfathered right has not been conveyed for a non-irrigation use, may be irrigated with any water. In an initial active management area, land which was not irrigated at any time from January 1, 1975 through January 1, 1980 is deemed to have been in irrigation if the director finds that either of the following apply:

1. In areas of an initial active management area not des-

ignated as critical groundwater areas under prior statutory law prior to the date of the designation of the active management area, land is deemed to have been in irrigation if substantial capital investment has been made for the subjugation of such land for an irrigation use including on-site irrigation distribution facilities and a well or wells the drilling and construction of which were substantially commenced prior to the date of the designation of the active management area.

2. In areas of an initial active management area which were designated as critical groundwater areas under prior statutory law, land is deemed to have been in irrigation if substantial capital investment has been made in the twelve months before June 12, 1980 for the improvement of the land and on-site irrigation distribution facilities, including the drilling of wells, for an irrigation use. This paragraph does not allow irrigation of land which could not have been legally irrigated under prior statutory law.

B. In an initial active management area, a person who owns acres of land which may be irrigated pursuant to subsection A of this section may apply to the director during the central Arizona project contracting period, but no later than January 1, 1985, to permanently retire all or a portion of such acres from irrigation and to irrigate conjunctively with central Arizona project water the same number of substitute acres. The director may approve the substitution of acres if the director determines that all of the following exist:

1. The substitute acres were legally irrigated during the period of September 30, 1958 to September 30, 1968, or such other period as the United States secretary of the interior may designate.

2. The acres to be retired from irrigation and the substitute acres are located outside of the exterior boundaries of the service area of a city, town or private water company and such acres are located within the same irrigation district and the same sub-basin.

3. The substitution of acres is necessary to enable the irrigation district within which the acres are located to contract for and deliver central Arizona project water.

4. Central Arizona project water available to the irrigation district within which the acres are located will be adequate to supply the substitute acres.

5. The substitution of acres will benefit the management of the active management area in which the acres are located.

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G. In a subsequent active management area, except as provided in subsection H of this section, only acres of land which were legally irrigated at any time during the five years preceding the date of the designation of the active management area, which are capable of being irrigated, which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469 and for which the irrigation grandfathered right has not been conveyed for a non-irrigation use, may be irrigated with any water.

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(As amended by Laws 1981, Ch. 192, § 8.)

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§ 45-453. Groundwater rights and uses in areas outside active management areas; amounts; transportation; irrigation non-expansion areas

In areas outside of active management areas, a person may:

1. Withdraw and use groundwater for reasonable and beneficial use.

2. Transport groundwater pursuant to article 8 of this chapter.

3. Use groundwater for irrigation purposes within the exterior boundaries of an irrigation non-expansion area only pursuant to article 3 of this chapter.

Article 5. Grandfathered Groundwater Rights in Active Management Areas

§ 45-461. Definitions.

In this article, unless the context otherwise requires:

1. "Certificate of exemption" means a certificate which was issued by the state land department or Arizona water commission under prior statutory law for the purpose of describing specific uses and amounts of water which could not be enjoined if found to constitute the transfer or transportation of groundwater.

2. "Development plan" means a plan for the non-irrigation use of land in connection with which land has been or will be retired from irrigation for the bona fide purpose of conserving or using water for such non-irrigation use which would otherwise be used to irrigate the retired land.

* * * * *

§ 45-462. Grandfathered groundwater rights; persons included; certificate of exemption amount is legal use

A. In an active management area, a person who was legally withdrawing and using groundwater as of the date of the designation of the active management area or who owns land legally entitled to be irrigated with groundwater as determined pursuant to this article has the right to withdraw or receive and use groundwater as determined by the director pursuant to this article.

B. For purposes of determining grandfathered rights pursuant to this article, a groundwater use shall not be determined to be illegal merely because the groundwater legally withdrawn is or has been transported.

C. The amount of groundwater use described by an application for a certificate of exemption is recognized as a legal use for purposes of determining grandfathered rights pursuant to § 45-464, subject to any modification as a result of a finding on appeal of a factual mistake by the state land department or Arizona water commission in computing the amount of the authorized withdrawal.

D. The right to withdraw or receive and use groundwater pursuant to this article is a grandfathered right. There are three categories of grandfathered rights as follows:

1. Non-irrigation grandfathered rights associated with retired irrigated land as determined pursuant to §§ 45-463, 45-469 and 45-472.

2. Non-irrigation grandfathered rights not associated with retired irrigated land as determined pursuant to § 45-464.

3. Irrigation grandfathered rights as determined pursuant to § 45-465.

§ 45-463. Type 1 non-irrigation grandfathered right associated with retired irrigated land; appurtenancy; ownership

A. In an initial active management area, a person who owns land which was legally entitled to be irrigated with groundwater and who retired such land from irrigation after January 1, 1965 but prior to the date of the designation of the active management area in anticipation of a non-irrigation use has the right to withdraw from or receive for such land three acre-feet of groundwater per acre per year upon showing that:

1. The land has been held under the same ownership since it was retired.

2. A development plan for the proposed non-irrigation use existed at the time the land was retired.

B. In a subsequent active management area, a person who owns land which was legally entitled to be irrigated with groundwater and retires such land from irrigation prior to the date of the designation of the active management area in anticipation of a non-irrigation use has the right to withdraw from or receive for such land the lesser of three acre-feet of groundwater per acre per year or the average annual amount of groundwater which was used per acre during the five years preceding the time the land was retired upon showing that:

1. The land has been held under the same ownership since it was retired.

2. A development plan for the proposed non-irrigation use existed at the time the land was retired and is filed with the director within ninety days after the active management area is designated.

C. The development plan requirements of this section are deemed fulfilled if the land retired from irrigation has been described in an application for a certificate of exemption or if the land retired from irrigation is owned in conjunction with non-irrigation uses existing or for which substantial capital commitments have been incurred for the non-irrigation development of such land as of the date of the designation of the active management area.

D. The right to withdraw or receive groundwater pursuant to this section is a non-irrigation grandfathered right associated with retired irrigated land, or a type 1 non-irrigation grandfathered right.

E. A type 1 non-irrigation grandfathered right is appurtenant to the acre of retired irrigated land associated with the right, is owned by the owner of the land to which the right is appurtenant and may be leased with the land.

§ 45-464. Type 2 non-irrigation grandfathered right not associated with retired irrigated land; determination of amount; ownership

A. In an active management area, a person who owns land from which groundwater was being legally withdrawn and used for a non-irrigation purpose as of the date of the designation of the active management area has the right to withdraw annually:

1. If the person holds a certificate of exemption, the greater of:

(a) The amount of groundwater established in proceedings on the application for certificate of exemption, subject to any modification as a result of a finding on appeal of a factual mistake by the state land department or Arizona water commission in computing the amount of the authorized withdrawal, less the amount of any right obtained by the person pursuant to § 45-463.

(b) The maximum amount of groundwater legally withdrawn from such land and used by the person in any one of the five years preceding the date of the designation of the active management area, less the amount of any right obtained by the person pursuant to § 45-463.

2. If the person does not hold a certificate of exemption, the maximum amount of groundwater legally withdrawn from such land and used by the person withdrawing the groundwater in any one of the five years preceding the date of the designation of the active management area, less the amount of any right obtained pursuant to § 45-463 by the

person withdrawing groundwater from such land which has not been subtracted by the person withdrawing the groundwater in calculating the amount of another right pursuant to this section.

* * * * *

D. If a person has been using groundwater for less than one year during the twelve months immediately preceding the date of the designation of the active management area, the amount of the grandfathered right pursuant to this section is the annual amount determined by the director to be reasonable for a full year to meet the requirements for a facility owned by such person in existence as of the date of the designation of the active management area.

E. The right to withdraw groundwater pursuant to this section is a non-irrigation grandfathered right not associated with retired irrigated land, or a type 2 non-irrigation grandfathered right.

F. A type 2 non-irrigation grandfathered right is owned by the owner of the land from which the groundwater is withdrawn and may be leased with such land.

G. If the user of a type 2 non-irrigation grandfathered right is different from the owner of the right, either the owner, or the user of the right on behalf of the owner, may apply for a certificate of grandfathered right pursuant to § 45-476.

§ 45-465. Irrigation grandfathered right; determination of acres entitled to and amount; appurtenancy

A. In an active management area, a person who owns land which was legally irrigated at any time during the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas, which is capable of being irrigated and which has not been

retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469, has the right to use groundwater for the irrigation of such land as determined pursuant to subjection B of this section.

B. The director shall compute the maximum amount of groundwater which may be used pursuant to this section as follows:

1. Determine the farm units, as defined in § 45-402, within the active management area.

2. Determine the irrigation water duty, as defined in § 45-402, for each farm unit in an active management area, pursuant to §§ 45-564 through 45-568.

3. Determine the water duty acres for each farm within the farm unit. The water duty acres are the highest number of acres in the farm, taking land rotation into account, which were legally irrigated during any one year in the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas.

4. Determine the irrigation acres for each farm within the farm unit. The irrigation acres are the acres in the farm which were legally irrigated at any time during the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas, which are capable of being irrigated and which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469.

5. Multiply the water duty acres for each farm within the farm unit by the irrigation water duty for the farm unit and divide that amount by the number of irrigation acres in the farm. The result shall be the maximum amount of groundwater which may be used per year for the irrigation of each irrigation acre in the farm. If the farm is irrigated solely with groundwater, the amount of groundwater used by the farm for irrigation shall be accounted for pursuant to § 45-

467, subsection C. If a farm is irrigated with a combination of surface water and groundwater, the amount of groundwater used by the farm for irrigation shall be accounted for pursuant to § 45-467, subsections D and E.

C. The right to use groundwater pursuant to this section for the irrigation of an irrigation acre is an irrigation grandfathered right and is appurtenant to that acre. An irrigation grandfathered right is owned by the owner of the land to which it is appurtenant and may be leased for an irrigation use with the land to which it is appurtenant.

D. A person who owns or leases irrigation acres may use the total amount of groundwater allowed by the irrigation grandfathered right for such acres for the irrigation of all or a portion of such acres.

E. If the irrigation water duty for the farm unit in which an irrigation acre is located is reduced by the director pursuant to article 9 of this chapter, the amount of groundwater which may be used for the irrigation of such acre pursuant to the irrigation grandfathered right under this section is reduced accordingly.

F. For purposes of this chapter, the amount of groundwater which may be used or is used is the amount of groundwater withdrawn by the groundwater user, measured at the point of withdrawal, and the amount of groundwater received by the groundwater user from an irrigation district or other source.

§ 45-466. Limitations on use of irrigation water duty; deliveries of water in excess of irrigation water duty

The irrigation water duty shall be used to determine the maximum amount of groundwater which may be used pursuant to § 45-465 and debits and credits to the operating

flexibility account as set forth in § 45-467. The irrigation water duty shall not be applied to diminish surface water delivered to lands pursuant to appropriative surface water rights or decreed surface water rights.

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§ 45-469. Right to retire irrigation grandfathered right for non-irrigation use; development plan approval; amendment of plan; approval of plan prior to retirement; amount which may be withdrawn; service area determined

A. A person who owns land legally entitled to be irrigated with groundwater pursuant to an irrigation grandfathered right which is located within an active management area and outside of the exterior boundaries of the service area of a city, town or private water company has the right to retire such land from irrigation in anticipation of a future non-irrigation use and shall not forfeit or abandon the right to withdraw from or receive for such land the amount of groundwater calculated pursuant to subsection F of this section for a non-irrigation use if:

1. The land is held in the same ownership.

2. A developent plan for the proposed non-irrigation use exists and is approved by the director within a reasonable time before or after the land is retired.

* * * * *

F. The amount of groundwater which may be withdrawn or received annually per acre pursuant to this section is the lesser of:

1. The current maximum amount of groundwater which may be used pursuant to the irrigation grandfathered right for the acre at the time it is retired, as calculated pursuant to § 45-465, subsection B.

2. Three acre-feet multiplied by the water duty acres in the farm in which the acre to which the right is appurtenant is located divided by the number of irrigation acres in the farm.

* * * * *

H. Whether the land to which an irrigation grandfathered right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company shall be determined as of the date the development plan is filed with the director according to the most current map of the service area of the city, town or private water company available for public inspection on that date as required by § 45-498:

1. In the city clerk's office for a city.

2. In the town clerk's office for a town.

3. In the appropriate county recorder's office for a private water company.

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§ 45-470. Use of type 1 non-irrigation grandfathered right by original owner

A. The original owner of a type 1 non-irrigation grandfathered right pursuant to § 45-463 or 45-469 may:

1. Use groundwater withdrawn pursuant to the right for any non-irrigation use:

(a) On the land to which the right is appurtenant.

(b) On any other land, subject to the provisions governing transportation of groundwater in article 8 of this chapter, except that, if the land to which the right is appurtenant is included within the exterior boundaries of the service area of a city, town or private water company, use groundwater on other land only if the use on other land was commenced prior to the date of the designation of the ac-

tive management area or is pursuant to a development plan filed with the director prior to the inclusion of the land within the exterior boundaries of the service area of the city, town or private water company.

2. Pursuant to § 45-473, convey retired irrigated land with the appurtenant type 1 non-irrigation grandfathered right. Any land not conveyed shall retain its appurtenant type 1 non-irrigation grandfathered right.

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§ 45-471. Use of type 2 non-irrigation grandfathered right by owner

A. The owner of a type 2 non-irrigation grandfathered right pursuant to § 45-464 may use groundwater withdrawn pursuant to the right for any non-irrigation purpose at any location, subject to the provisions governing transportation of groundwater in article 8 of this chapter, except that, if the right is based on withdrawals of groundwater:

1. For the extraction or processing of minerals, the owner may use groundwater withdrawn pursuant to the right only for the purpose of mineral extraction or processing.

2. For the generation of electrical energy, the owner may use groundwater withdrawn pursuant to the right only for electrical energy generation.

B. If a type 2 non-irrigation grandfathered right is leased, the lessee may use groundwater withdrawn pursuant to the right subject to the provisions of subsection A of this section.

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§ 45-472. Conveyance of irrigation grandfathered right; within service area; outside service area; change to non-irrigation grandfathered right; forfeiture of right to convey to non-irrigation use

A. The owner of an irrigation grandfathered right may convey the right only with the land to which the right is appurtenant.

B. If the land to which an irrigation grandfathered right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company:

1. The irrigation grandfathered right may be conveyed only for an irrigation use, except for expanded animal industry use or as provided in paragraphs 2 and 3 of this subsection. If an irrigation grandfathered right is conveyed for an irrigation or expanded animal industry use, the full amount of the right is conveyed. The amount of groundwater conveyed pursuant to the right:

(a) For an irrigation use may be withdrawn by the new owner of the right only from the land to which the right is appurtenant and used on that land or on contiguous irrigation acres under common ownership within the service area of the city, town or private water company, except that, if the groundwater was delivered by an irrigation district to the previous owner of the right, the irrigation district

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C. If the land to which an irrigation grandfathered right is appurtenant is included within the exterior boundaries of the service area of a city, town or private water company subsequent to the date of the designation of an active management area, the owner of the right may, with the approval of the director and consistent with the provisions of this chapter, convey the grandfathered right for a non-irrigation use, other than an expanded animal industry use, on the land to which the right is appurtenant, upon a showing that adequate water service is unavailable at rates comparable to rates charged similar classes of water users

within such service area. The amount of the right conveyed is determined pursuant to subsection B, paragraph 3 of this section.

D. If the land to which an irrigation grandfathered right is appurtenant is outside of the exterior boundaries of the service area of a city, town or private water company:

1. The irrigation grandfathered right may be conveyed for an irrigation use or a non-irrigation use. If an irrigation grandfathered right is conveyed for an irrigation or an expanded animal industry use, the full amount of the right is conveyed. If an irrigation grandfathered right is conveyed for a non-irrigation use, other than an expanded animal industry use, the amount of the right that is conveyed is the lesser of:

(a) The current maximum amount of groundwater which may be used pursuant to the right as calculated pursuant to § 45-465, subsection B.

(b) Three acre-feet per year multiplied by the number of water duty acres in the farm in which the acre to which the right is appurtenant is located divided by the number of irrigation acres in the farm.

2. The amount of groundwater conveyed pursuant to the right, as determined in paragraph 1 of this subsection, may be withdrawn by the new owner of the right only from the land to which the right is appurtenant and used on that land or on any other land, subject to the provisions of article 8 of this chapter relating to transportation of groundwater, except that, if the groundwater was delivered by an irrigation district to the previous owner of the right, the irrigation district may continue to deliver groundwater to the new owner pursuant to the right. If any portion of the amount of groundwater conveyed is withdrawn by the new owner and used on other land, no additional groundwater may be withdrawn for use on the land to which the right is appurtenant, except that, if the new owner is an industry, it may withdraw a portion of the amount of groundwater

conveyed for use on other land and withdraw the remainder of the amount of groundwater conveyed for municipal and industrial use on the land to which the right is appurtenant for purposes directly related to the industry's industrial operation.

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(As amended by Laws 1981, Ch. 192, § 9.)

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§ 45-473. Conveyance of type 1 non-irrigation grandfathered right; use by new owner; appurtenancy; within service area; outside service area

A. The owner of a type 1 non-irrigation grandfathered right may convey the right only for a non-irrigation use and only with the land to which it is appurtenant. For purposes of this section, a type 1 non-irrigation grandfathered right means a non-irrigation grandfathered right associated with retired irrigated land pursuant to § 45-463 or 45-469 or an irrigation grandfathered right which was conveyed for a non-irrigation use pursuant to § 45-472.

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§ 45-474. Conveyance of type 2 non-irrigation grandfathered right; amount

A. The owner of a type 2 non-irrigation grandfathered right may convey the right for any non-irrigation use except that:

1. A type 2 non-irrigation grandfathered right that is used for purposes of mineral extraction or processing may be conveyed only for a mineral extraction or processing use.

2. A type 2 non-irrigation grandfathered right that is used for purposes of electrical energy generation may be conveyed only for an electrical energy generation use.

B. A type 2 non-irrigation grandfathered right may not be conveyed for an irrigation use.

C. If a type 2 non-irrigation grandfathered right is conveyed, the full amount of the right is conveyed.

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§ 45-476. Application for certificate of grandfathered right

A. A person claiming the right to withdraw or receive and use groundwater pursuant to a grandfathered right shall file an application for a certificate of grandfathered right with the department not later than fifteen months after the date of the designation of the active management area on a form provided by the department.

B. The application for a certificate of grandfathered right not based upon prior proceedings on a certificate of exemption shall include the following:

1. The name and mailing address of the applicant.

2. The name of the active management area within which the withdrawal of groundwater pursuant to the claimed grandfathered right is being or has been made.

3. If the application is for a type 1 non-irrigation grandfathered right:

(a) The legal description and a map of the retired irrigated land in respect of which the right is claimed.

(b) The date when the irrigated land was retired.

(c) Such evidence as the director shall require that the retired irrigated land has been held under the same ownership since it was retired and that a development plan for the proposed non-irrigation use existed at the time the land was retired.

(d) If in a subsequent active management area, the amount of groundwater used per acre for the retired irrigated land each year during the five years preceding the time the land was retired.

4. If the application is for a type 2 non-irrigation grandfathered right:

(a) The maximum amount of groundwater legally withdrawn from land owned by the applicant and used in any one year during the five years preceding the date of the designation of the active management area.

(b) If the person withdrawing groundwater from the land owned by the applicant has made application for a type 1 non-irrigation grandfathered right, a copy of the application.

5. If the application is for an irrigation grandfathered right:

(a) The legal description and a map of all land owned by the applicant which was legally irrigated at any time during the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas and the highest number of acres legally irrigated with groundwater at one time in any one year during the five-year period.

(b) The type of crops grown on such land and the cropping patterns used during the five-year period.

(c) The irrigation methods and devices currently being used in the irrigation of such land.

6. The location of each well from which groundwater is being or has been withdrawn by the applicant to irrigate such land.

7. The sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

8. Any other information the director may require.

C. A person or his successor claiming the right to use groundwater pursuant to a grandfathered right, described in whole or in part by a certificate of exemption, shall file an application for a certificate of grandfathered right as

provided in subsection D and shall automatically be entitled to a certificate or certificates of grandfathered right for the portion of the grandfathered right claimed which is evidenced by the certificate of exemption or established by the proceedings on the certificate of exemption. Notice of the application is not required and hearings shall not be held. If the applicant claims grandfathered rights in addition to the amount of use described in the certificate of exemption, application for such additional amount shall be made pursuant to subsection B, and such application is subject to the notice, objection and hearing provisions applicable to applications made pursuant to that subsection.

D. The application for a certificate of grandfathered right based upon prior proceedings upon an application for a certificate of exemption shall include the following:

1. The name and mailing address of the applicant.

2. The name of the active management area within which the withdrawal of groundwater pursuant to the claimed grandfathered right is being or has been made.

3. The total amount of groundwater to be withdrawn annually under the certificate of exemption.

4. The number of retired irrigated acres described in the application for a certificate of exemption.

5. Such evidence as the director shall require that the retired irrigated land has been held under the same ownership since it was retired.

6. The number of the certificate of exemption and a copy of the certificate of exemption.

7. The sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

8. Any other information the director may require.

* * * * *

§ 45-478. Notice of requirement to apply for certificate of grandfathered right

A. Within ninety days of the date of the designation of an active management area, the director shall give notice of the requirement to apply for a certificate of grandfathered right to the clerk of the board of supervisors of the county or counties in which the active management area is located and to the mayor of each city or town, to each private water company and to the presiding officer of each political subdivision established pursuant to chapter 4, 5, 6 or 7 of this title located in the active management area.

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D. The director may also give written notice in any other manner which will carry out the purposes of this section.

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Article 6. Groundwater Rights and Uses within Service Areas

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§ 45-492. Withdrawals by cities, towns and private water companies within services areas; contract to supply groundwater

A. In an active management area, a city, town or private water company shall have the right to withdraw and transport groundwater within its service area for the benefit of landowners and residents within its service area, and the landowners and residents are entitled to use the groundwater delivered, subject to:

1. The provisions of article 8 of this chapter relating to transportation of groundwater.

2. Conservation requirements developed by the director pursuant to article 9 of this chapter.

B. Claims of landowners to irrigation grandfathered rights or type 1 or 2 non-irrigation grandfathered rights shall be subject to the provisions of article 5 of this chapter.

C. A city or town may contract to supply groundwater to a city, town or private water company in the same active management area if it is consistent with the management plan for the active management area and is approved by the director.

§45-493. Limitations on extensions of service areas; prohibition on formation of private water company for irrigation purpose

A. In an active management area, the service area of a city, town or private water company may not be extended primarily for any of the following purposes:

1. Including a well field within the service area.

2. Furnishing disproportionately large amounts of water to an industrial or any other large water user unless it is consistent with the management plan for the active management area and is approved by the director.

3. Including irrigation acres within the exterior boundaries of the service area to extinguish the right to convey irrigation grandfathered rights to a non-irrigation use.

B. Within an active management area, a city, town or private water company may not extend its service area for the purpose of withdrawing and distributing groundwater for irrigation purposes.

C. Subsequent to the date of the designation of the active management area, a private water company may not be formed within an active management area to withdraw and distribute groundwater for irrigation purposes.

* * * * *

§ 45-498. Maps of service areas

A. Each city, town, private water company and irrigation district in an active management area shall maintain a current map clearly delineating its service area and distribution system in the director's office and shall furnish such other related data as the director may require. In addition:

1. Each city and town shall maintain a current map of its service area and distribution system in its city or town clerk's office.

2. Each private water company and irrigation district shall maintain a current map of its service area and distribution system in its offices.

B. All maps required by this section shall be available for examination by the public at reasonable times.

Article 7. Groundwater Withdrawal Permits

§45-511 Definitions

In this article, unless the context otherwise requires:

1. "General industrial use" means a non-irrigation use of groundwater except those subject to permits issued pursuant to §§ 45-513 and 45-514 and those for which a certificate of assured water supply is required pursuant to § 45-576. General industrial use includes animal industry use.

2. "Permit" means a permit to withdraw groundwater which is issued by the director pursuant to this article.

§ 45-512. Categories of groundwater withdrawal permits

Except as provided in § 45-452, subsection H and articles 5 and 6 of this chapter, a person may not withdraw groundwater from a nonexempt well in an active management area unless the person obtains a groundwater withdrawal permit from the director pursuant to this article. The categories of groundwater withdrawal permits are as follows:

1. Dewatering permits issued pursuant to § 45-513.

2. Mineral extraction and metallurgical processing permits issued pursuant to § 45-514.

3. General industrial use permits issued pursuant to § 45-515.

4. Poor quality groundwater permits issued pursuant to § 45-516.

5. Temporary permits issued pursuant to §§ 45-517 and 45-518.

6. Drainage water permits issued pursuant to § 45-519.

§ 45-513. Dewatering permit; priorities for use of groundwater; conditions on director; duration of permit

A. A person who is engaged in or proposes to engage in the extraction and processing of minerals shall be issued a dewatering permit for the beneficial use of the land for mineral extraction, metallurgical processing and for compliance with applicable environmental controls. For purposes of this section, "dewatering" means the withdrawal of groundwater from pits, from in, under and around ore bodies in proximity to pits and from underground workings. Dewatering does not include process water and tailing water recovered from or pumped from beneath tailing ponds, and a permit is not required therefor if such water is recycled into the extraction or metallurgical process.

B. Groundwater withdrawn pursuant to a dewatering permit shall be used in the following order of priority:

1. To meet mineral extraction, metallurgical processing and environmental control requirements of the permittee.

2. To a city, town, private water company or farm and any other person whose respective ability to withdraw groundwater has been adversely affected by a dewatering permit. Such water shall be equitably allocated by the director without costs but subject to the conditions set forth in subsection C of this section among such persons

adversely affected by such dewatering. A person who receives an allocation of water under this paragraph shall reduce his groundwater withdrawals by the amount of water he receives under this paragraph. A person receiving water under this paragraph does not thereby forfeit or abandon his right to withdraw groundwater.

3. For municipal, commercial, domestic and industrial needs of communities and residential areas directly related to the mineral extraction and metallurgical processing operation of the permittee.

4. To irrigate land owned or controlled by the permittee which is entitled to the use of groundwater for irrigation.

5. To the director for such distribution as will best achieve the goals and purposes of the management plan for the active management area.

6. For such other legal purpose as the permittee elects.

C. Groundwater made available to the director for distribution or allocation under this section is subject to the following conditions:

1. The permittee shall deliver the groundwater to the boundary of his property but shall not be obligated to deliver it further.

2. The permittee shall not be required to treat the chemical quality of the groundwater for distribution or allocation.

3. The permittee shall not be required to make the groundwater available if dewatering ceases, or if all or any portion of the groundwater is needed for a purpose having a higher priority as specified in subsection B of this section.

4. The person actually using the groundwater distributed or allocated by the director shall be responsible for paying any withdrawal fees required under § 45-611.

5. If the director sells water, proceeds shall be applied as follows:

(a) To cover costs, if any, of the director in delivering water to other users.

(b) To cover the permittee's cost in transporting water to the boundary of his property.

(c) To the active management area for general purposes as determined by the director.

D. A permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

45-514. Mineral extraction and metallurgical processing permit; conditions for issuance; duration of permit

A. A person who is engaged in or proposes to engage in the extraction and processing of minerals shall be issued a permit to withdraw groundwater in the required amount, if all of the following apply:

1. The amount of groundwater available for mineral extraction, metallurgical processing and compliance with applicable environmental controls under a dewatering permit is insufficient.

2. Uncommitted municipal and industrial central Arizona project water is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost which does not exceed the current municipal and industrial central Arizona project delivery rates.

3. Other surface water of adequate quality or effluent of adequate quality is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost, including treatment costs, which does not exceed by twenty-five per cent the cost the operator would otherwise incur in withdrawing groundwater.

B. A permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

C. If, during the duration of a mineral extraction and metallurgical processing permit, the director determines that uncommitted municipal and industrial central Arizona project water is available or surface water of adequate quality or effluent of adequate quality is available to the permittee at a cost comparable to groundwater, the director may require the permittee to use such water in lieu of groundwater.

§ 45-515. General industrial use permits; conditions for issuance; duration of permit

A. The director shall issue a permit to withdraw groundwater from a point outside of the exterior boundaries of the service area of a city, town or private water company for a general industrial use outside of the exterior boundaries of such service area if the director determines that all of the following apply:

1. Uncommitted municipal and industrial central Arizona project water is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost which does not exceed the current municipal and industrial central Arizona project rates.

2. Other surface water of adequate quality or effluent of adequate quality is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost, including treatment costs, which does not exceed by twenty-five per cent the cost the operator would otherwise incur in withdrawing groundwater.

3. Irrigation grandfathered rights are not available for purchase at a reasonable price or cannot be acquired by eminent domain.

4. The intended general industrial use, if located within three miles of the exterior boundaries of the service area of a city, town or private water company has been denied service by the city, town or private water company at the customary rate in the customary manner. The requirement of this paragraph does not apply to an expanded animal industry use.

5. The management plan for the active management area can be adjusted to accommodate the intended general industrial use consistent with the achievement of the overall management goal of the active management area.

6. There is an assured water supply for the intended use at the intended point of withdrawal. For purposes of this section, "assured water supply" means sufficient groundwater of adequate quality will be available to the applicant to satisfy the projected general industrial use for the duration of the permit.

B. A permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

C. If, during the life of the permit, the director determines that uncommitted municipal and industrial central Arizona project water is available or other water or effluent of adequate quality is available at a cost comparable to groundwater, the director may require the permittee to use such water in lieu of groundwater.

§ 45-516. Poor quality groundwater withdrawal permit; conditions for issuance; duration of permit

A. The director may issue a permit to a non-irrigation user to withdraw poor quality groundwater if he determines that the groundwater to be withdrawn because of its quality has no other beneficial use at the present time and that the withdrawal of such groundwater is consistent with the management plan.

B. A permit issued pursuant to this section may be issued for a period of up to thirty-five years, subject to subsection C. The director shall determine the duration of the permit on the basis of the estimated life of the source of poor quality groundwater.

C. The director shall monitor withdrawals of groundwater pursuant to poor quality groundwater withdrawal permit and shall terminate the permit if the conditions specified in subsection A no longer apply.

§ 45-517. Temporary permit for electrical energy generation; conditions for issuance

A. The director shall, upon an adequate showing that an emergency exists, issue a temporary permit to a person engaged in the generation of electrical energy to withdraw groundwater in excess of the amount of groundwater the person is legally entitled to withdraw under a grandfathered right or other groundwater withdrawal permit.

B. A person may withdraw groundwater in excess of the amount he is legally entitled to withdraw before a permit is issued pursuant to this section. Such person, as soon as reasonably practicable after such withdrawals of groundwater commence, shall submit evidence to the director that an emergency exists.

C. The director shall monitor withdrawals of groundwater pursuant to a temporary permit and shall terminate the permit when the emergency ends.

§ 45-518. Temporary dewatering permit; conditions for issuance; duration of permit

A. The director may issue a temporary permit to a person to withdraw groundwater for dewatering purposes if the director determines that:

1. Dewatering is necessary for the beneficial use of the land from which the groundwater is proposed to be withdrawn.

2. Dewatering is consistent within the management plan for the active management area.

B. A permit issued pursuant to this section may be issued for a period of up to one year, subject to subsection C.

C. The director shall monitor withdrawals of groundwater pursuant to a temporary dewatering permit and shall terminate the permit if the conditions specified in subsection A no longer apply.

§ 45-519. Drainage water withdrawal permit; conditions for issuance

A. The director may issue a permit to a person to withdraw groundwater for drainage purposes if he determines that drainage of irrigated lands is necessary for a reasonable economic return from agricultural production in respect to those lands and the withdrawal of such groundwater is consistent with the management plan for the active management area.

B. The director shall monitor withdrawals of groundwater pursuant to a drainage permit and shall terminate the permit if the conditions for issuance specified in subsection A no longer apply. A permit issued pursuant to this section may be renewed subject to the same criteria used in granting the original permit.

§ 45-520. Point of withdrawal; location of use; conveyance

A. A person who withdraws groundwater under a permit issued pursuant to this article may change his point or points of withdrawal only pursuant to §§ 45-597 and 45-598 and may change his location of use only with the approval of the director and by applying for a modification of the permit pursuant to § 45-527.

B. A temporary permit issued pursuant to §§ 45-517 or 45-518 may not be conveyed. All other permits issued pursuant to this article may be conveyed only for the same use, subject to the approval of the director.

§ 45-521. Permit application form; filing; contents

Application for a permit to withdraw groundwater pursuant to this article shall be made on a form provided by the director which shall include the following information:

1. The name and mailing address of the applicant.

2. The name of the active management area and subbasin, if any, in which the applicant proposes to withdraw groundwater.

3. The name and mailing address of the owner of the land from which the applicant proposes to withdraw groundwater.

4. The legal description of the land on which the applicant proposes to use groundwater and the name and mailing address of the owner of such land.

5. The category of permit for which application is made.

6. The specific purpose for which the groundwater will be withdrawn.

7. The annual amount of groundwater, in acre-feet, for which application is made.

8. If the applicant proposes to withdraw groundwater from an existing well or wells, the location of each such well and the depth and diameter of each well and such other information the director requires.

9. If the applicant proposes to withdraw groundwater from a new well or wells, the proposed location of each such well and the depth and diameter proposed for each well and such other information the director requires.

10. If application is made for a dewatering permit pursuant to § 45-513:

(a) The estimated amount of groundwater necessary to meet mineral extraction and metallurgical processing requirements of the applicant.

(b) The estimated amount of groundwater necessary for municipal and industrial needs of communities and residential areas directly related to the mineral extraction and metallurgical processing operation of the applicant.

(c) The legal description of the acres of land owned or controlled by the applicant entitled to the use of groundwater for irrigation.

11. If application is made for a mineral extraction and metallurgical processing permit pursuant to § 45-514:

(a) The amount of groundwater available to the applicant under a dewatering permit previously obtained by the applicant.

(b) The estimated cost the applicant would incur in withdrawing groundwater at a point where his wellhead or distribution system would otherwise be.

12. If application is made for a general industrial use permit pursuant to § 45-515:

(a) The estimated cost the applicant would incur in withdrawing groundwater at the point where his wellhead or distribution system would otherwise be.

(b) Proof of denial of service or inaction on a service request by a city, town or private water company if the location of the applicant's intended use is within three miles of the exterior boundaries of the service area of such city, town or private water company. Such evidence is not required for an expanded animal industry use.

(c) Studies satisfactory to the director of the probable hydrologic impact on the groundwater resources which the applicant proposes to use including evidence of the availability of an assured water supply for the intended use.

13. If application is made for a temporary dewatering permit pursuant to § 45-518, evidence demonstrating that a temporary dewatering permit is necessary for beneficial use of the land from which the groundwater is proposed to be withdrawn.

14. If application is made for a drainage water permit pursuant to § 45-519:

(a) Evidence that drainage of the applicant's irrigated lands is necessary for a reasonable economic return from agricultural production on such lands.

(b) The legal description of the acres of land owned or controlled by the applicant entitled to the use of groundwater for irrigation.

15. A sworn statement that the information contained in the application is true and correct to the best belief and knowledge of the applicant.

16. Any other information which the director may require.

(As amended by Laws 1981, Ch. 192, §15.)

§ 45-522. Correction of application

Upon receipt of an application, the director shall endorse on the application the date of its receipt and keep a record of the application. If the director determines the application is incorrect or incomplete, the director shall return the application specifically stating the reasons for its return. A record shall be made of any application returned. The applicant may reapply and the reapplication shall be treated as a new application.

§ 45-523. Notice; objections; hearing

A. When the permit application is determined complete and correct, the director shall, within thirty days of such determination, give notice of the application once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in which the active management area in which the applicant proposes to withdraw groundwater is located.

B. Notice pursuant to subsection A of this section shall state that objections to the issuance of the permit may be filed, by persons residing in the active management area, in writing, with the director within thirty days after the last publication of notice and that objections are limited to whether the permit application meets the criteria for issuance of a permit as set forth in this article. An objection shall state the name and mailing address of the objector, be signed by the objector, his agent or attorney and clearly set forth reasons why the permit should not be issued.

C. In appropriate cases, including cases where a proper written objection to the permit application has been filed, the director may hold a hearing on the application. The director shall, thirty days prior to the date of the hearing, give notice in the manner described in subsection A of this section. The hearing shall be scheduled for not less than sixty days nor more than ninety days after the expiration of the time in which to file objections. A hearing shall be conducted as provided in § 45-480, subsection B.

§ 45-524. Approval or rejection of permit application

A. The approval or rejection of an application for a permit shall be endorsed on the application and dated. If the permit is denied, the director shall return the application to the applicant specifically stating the reasons for denial.

B. A permit issued by the director shall contain the following information:

1. The name and mailing address of the person to whom the permit is issued.

2. The name of the active management area and subbasin in which the groundwater may be withdrawn.

3. The category of permit issued.

4. The specific purpose for which the permit is issued.

5. The point or points of withdrawal of groundwater pursuant to the permit.

6. The legal description of the land on which the groundwater may be used.

7. The total annual amount of groundwater that may be withdrawn.

8. If groundwater is to be withdrawn from a new well or wells, the depth, diameter and general specifications for each such well.

9. The duration of the permit.

10. Conditions on the permit authorized by this chapter or rules or regulations adopted pursuant to this chapter and such other information as the director may determine.

§ 45-525. Registry of permits; reporting

A. The director shall establish and maintain a registry of permits for each active management area. The registry shall include a copy of each permit in the active management area and such other pertinent information as the director determines is necessary.

B. A person to whom a permit is issued shall notify the director of a change in name or mailing address, a change in point of withdrawal or a conveyance of a permit pursuant to § 45-520. A person to whom a permit is conveyed shall

notify the director of the conveyance and shall furnish information as required by the director to keep the registry current and accurate. The director shall have continuing jurisdiction and shall issue revised permits as necessary.

C. The director may require holders of permits to file additional information with the annual report required by § 45-632 as necessary to keep the registry current and accurate. For purposes of this article, "holder" means a person to whom a permit is issued or a person to whom a permit is conveyed.

§ 45-526. Appeals

A person whose application is denied or a person who contested a permit by filing a proper objection pursuant to § 45-523 may appeal the decision as provided in § 45-405.

§ 45-527. Modification of permit

A permittee may seek modification of an unexpired groundwater withdrawal permit and renewal of a permit within six months prior to the date of the expiration of the permit. All permit modifications or renewal applications shall be treated in the same manner as the initial permit application and are subject to the same criteria used in issuing the initial permit.

§ 45-528 Revocation of permits

A. After a hearing in the manner provided in § 45-480, subsection B, the director may permanently, or temporarily, in whole or in part, revoke a groundwater withdrawal permit for any of the following reasons:

1. For a material false statement in an application to initiate, modify or renew a permit, or for a material false statement in any report required to be filed by a person withdrawing or using groundwater pursuant to the provisions of this chapter.

2. For violation of the terms of the permit.

3. For failure to exercise a permit for five or more consecutive years.

B. The director may revoke a groundwater withdrawal permit with the written consent of the permittee and in such case a hearing is not required.

Article 8. Transportation of Groundwater

§ 45-541. Transportation within a sub-basin

A. Groundwater which is withdrawn pursuant to a grandfathered right or a groundwater withdrawal permit may be transported without payment of damages within a sub-basin of an active management area, subject to the limitations on location of use in §§ 45-472 and 45-473.

B. Groundwater which is withdrawn by a city, town or private water company within its service area may be transported without payment of damages within its service area within a sub-basin of an active management area.

C. Groundwater which is withdrawn by a city or town within its service area may be transported pursuant to a delivery contract authorized by § 45-492, subsection C, without payment of damages, within a sub-basin of an active management area.

D. Groundwater which is withdrawn by an irrigation district within its service area may be transported without payment of damages within its service area within a sub-basin of an active management area.

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§ 45-543. Transportation between sub-basins or away from an active management area; damages; non-irrigation grandfathered right not associated with retired irrigated land; service area withdrawals; permit

A. Groundwater may be transported between sub-basins of an active management area or away from an active management area, subject to payment of damages, if the groundwater is withdrawn:

1. Pursuant to a type 2 non-irrigation grandfathered right.

2. By a city, town or private water company within its service area and transported within its service area.

3. By an irrigation district within its service area and transported within its service area.

4. Pursuant to a groundwater withdrawal permit.

B. Groundwater which is withdrawn by a city or town within its service area may be transported pursuant to a delivery contract authorized by § 45-492, subsection C between sub-basins of an active management area and shall be subject to payment of damages unless the groundwater is withdrawn pursuant to a type 1 non-irrigation grandfathered right.

§ 45-544. Transportation in areas not subject to active management; damages

In areas outside of active management areas, groundwater may be transported:

1. Within a sub-basin of a groundwater basin or within a groundwater basin, if there are no sub-basins, without payment of damages.

2. Between sub-basins of a groundwater basin or away from a groundwater basin, subject to payment of damages.

* * * * *

Article 9. Management

§ 45-561. Definitions

In this article, unless the context otherwise requires:

1. "Augmentation" means to supplement the water supply of an active management area and may include the importation of water into the active management area, storage of water or artificial groundwater recharge.

2. "Industrial use" means a non-irrigation use of water not supplied by a city, town or private water company, including animal industry use and expanded animal industry use.

3. "Intermediate water duty" means an irrigation water duty, as defined in § 45-402, which is established by the director during a management period to apply for a specific number of years during the management period.

4. "Management period" means a period of years prescribed by §§ 45-564 through 45-568 during which a prescribed management plan applies.

5. "Municipal use" means all non-irrigation uses of water supplied by a city, town, private water company or irrigation district.

6. "Safe-yield" means a groundwater management goal which attempts to achieve and thereafter maintain a long-term balance between the annual amount of groundwater withdrawn in an active management area and the annual amount of natural and artificial groundwater recharge in the active management area.

§ 45-562. Management goals for initial active management areas

A. The management goal of the Tucson, Phoenix and Prescott active management areas is safe-yield by January 1, 2025, or such earlier date as may be determined by the director.

B. The management goal of the Pinal active management area is to allow development of non-irrigation uses as provided in this chapter and to preserve existing agricultural economies in the active management area for as long as feasible, consistent with the necessity to preserve future water supplies for non-irrigation uses.

C. All initial active management areas are subject to all provisions of this chapter.

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§ 45-576. Certificate of assured water supply; designated areas; exemptions

A. A person who proposes to offer subdivided or unsubdivided lands, as these terms are defined in § 32-2101, for sale or lease in an active management area shall apply for and obtain a certificate of assured water supply from the director prior to presenting the plat for approval to the city, town or county in which the land is located, where such is required, and prior to filing with the state real estate commissioner a notice of intention to offer such lands for sale or lease, pursuant to §§ 32-2181 and 32-2195.01, unless the subdivision is located within an area designated as having an assured supply pursuant to subsection D or E of this section.

B. A city, town or county may approve a subdivision plat only if the subdivider has obtained a certificate of assured water supply from the director unless the subdivision is located within an area designated as having an assured water supply pursuant to subsection D or E of this section. The city, town or county shall note on the face of the approved plat that a certificate of assured water supply has been submitted with the plat or that the proposed subdivision is located within an area designated as having an assured supply, pursuant to subsection D or E of this section.

C. The state real estate commissioner may issue a public report authorizing the sale or lease of subdivided or unsubdivided lands only if the subdivider, owner or agent has obtained a certificate of assured water supply from the director, unless the lands are located within an area designated as having an assured water supply pursuant to subsection D or E of this section.

D. The director shall designate service areas of private water companies in active management areas where an assured water supply exists. An allocation for central Arizona project water by the United States secretary of the interior to a private water company is deemed a presumption of an assured water supply upon a finding by the director that the private water company has made an unconditional offer to enter into a contract for central Arizona project water sufficient to supply the intended use and is proceeding to develop the necessary delivery system and treatment works. The presumption of an assured water supply for a private water company ceases if the private water company refuses to enter into a contract for central Arizona project water during the contract period, as determined by the director. If a city or town acquires a private water company which has contracted for central Arizona project water, the city or town shall assume the private water company's contract for central Arizona project water.

E. The director may designate service areas of private water companies in active management areas where an assured water supply exists before an allocation of central Arizona project water as stated in subsection D of this section, on the written request of a person who proposes to offer for sale or lease subdivided or unsubdivided lands and the private water company that would serve the lands. The director shall determine in his best judgment whether, in addition to other available supplies, sufficient central Arizona project water will be allocated to the private water company to meet the water requirements of all existing development within its franchised area and the require-

ments of the specific proposed development or developments, taking into account the total request for central Arizona project water from all applicants, the reasonable foreseeability of an allocation by the secretary of the interior as recommended by the director and any need for reserving a portion of the total amount of central Arizona project water requested by all applicants in order to achieve the management goal within the active management area. The determination by the director shall be based upon a finding:

1. That the private water company has made an unconditional offer to enter into a contract for that amount of central Arizona project water determined by the director to be allocable.

2. That the private water company has submitted a plan generally describing the treatment works and facilities for the delivery and treatment of the central Arizona project water and a tentative schedule of major actions which the company will proceed with upon an allocation of central Arizona project water.

3. That the private water company will be able to finance and construct the necessary delivery system and treatment works.

4. If the method of delivery or treatment is by the use of works or facilities of another or by an exchange of water with another, either that there is an existing agreement for the use of the works or facilities or an exchange agreement or that there is a writen understanding between the parties of the general terms and criteria for such use or exchange.

F. A determination by the director pursuant to subsection E of this section that a sufficient amount of central Arizona project water can be so allocated is deemed a conditional presumption of an assured water supply for all existing development within its franchised area and the proposed development or developments specified in the director's determination. At the time the secretary of the

interior has ordered central Arizona project allocations for private water companies, the director's authority to make determinations which create conditional presumptions of assured water supply terminates. A conditional presumption created under this subsection terminates on the date of an allocation of central Arizona project water by the secretary of the interior to the private water company. Thereafter, the provisions of subsection D of this section apply.

G. The director shall designate service areas of cities and towns in active management areas where an assured water supply exists. If a city or town has received an allocation from the United States secretary of the interior for central Arizona project water or has signed a letter of intent with the director to contract for central Arizona project water, the service area and extensions of the service area of such city or town are deemed to have an assured water supply. If the city or town refuses to enter into a contract for central Arizona project water during the contract period, as determined by the director, the determination that the city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply within its service area. If a city or town enters into a contract for central Arizona project water, the service area and extensions of the service area of such city or town are deemed to continue to have an assured water supply until December 31, 2000. Commencing on January 1, 2001, the determination that the service area of a city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply within its service area.

H. A map identifying and describing the designated service areas of cities, towns and private water companies where an assured water supply exists shall be on file in the department and shall be available for examination by the public during regular business hours. The director shall no-

tify the mayors of all cities and towns in active management areas and the chairmen of the boards of supervisors of counties in which active management areas are located of the service areas where an assured water supply exists and any modification of such areas within thirty days of the designation or modification. Persons proposing to offer subdivided or unsubdivided lands located within such designated service areas for sale or lease are exempt from applying for and obtaining a certificate of assured water supply.

I. This section does not apply in the case of the sale of lands for developments which are subject to a mineral extraction and processing permit or an industrial use permit pursuant to §§ 45-514 and 45-515.

J. For purposes of this section, "assured water supply" means:

1. Sufficient groundwater or surface water of adequate quality will be continuously available to satisfy the water needs of the proposed use for at least one hundred years;

2. The projected water use is consistent with the management plan and achievement of the management goal for the active management area; and

3. The financial capability has been demonstrated to construct the delivery system and any treatment works necessary to make the supply of water available for the proposed use.

(As amended by Laws 1981, Ch. 192, § 17.)

§ 45-577. Application; hydrological study; review of application

A. The director shall prescribe the form of application for a certificate of assured water supply, to include, as applicable:

1. The legal description of the land.

2. The plats, plans and maps of the proposed development.

3. Information on the nature and magnitude of the proposed development, including the number of parcels, lots or dwelling units and the annual amount of water which will be required.

4. Evidence of contracts for the delivery of water and information relating to the terms of the contracts.

5. If groundwater is a proposed source of water:

(a) Evidence of ownership of any grandfathered rights pursuant to which groundwater may be withdrawn for the proposed development.

(b) The legal description of the location of any existing wells from which the applicant proposes to withdraw groundwater or the proposed location of new wells.

6. Evidence of the right to use surface water pursuant to chapter 1, article 2 of this title, pursuant to a judicial decree or pursuant to a right established prior to 1919.

7. Financing arrangements for the development and evidence of financial capability to construct the delivery system and any treatment works necessary to make the supply of water available for the proposed use.

8. A sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

9. Any other information which the director may require.

B. If groundwater is a proposed source of water, the applicant shall submit with the application for a certificate of assured water supply a copy of a hydrological study on the groundwater resources that demonstrates an assured supply for the proposed use. The director shall prescribe the contents of the study which is to be submitted with the application.

C. The director shall review and evaluate the application. The director may request additional information from the applicant and conduct independent investigations as may be necessary to determine whether an assured water supply exists.

§ 45-578. Notice; objections; hearing; issuance of certificate; appeals

A. When the application for a certificate of assured water supply is determined complete and correct, the director shall, within fourteen days of such determination, give notice of the application, once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in which the active management area in which the applicant proposes to withdraw groundwater is located.

* * * * *

Article 12. Enforcement

* * * * *

§45-635. Violation; civil penalties

A. A person who is determined pursuant to § 45-634 to be in violation of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter may be assessed a civil penalty in an amount not exceeding:

1. One hundred dollars per day of violation not directly related to illegal withdrawal, use or transportation of groundwater.

2. Ten thousand dollars per day of violation directly related to illegal withdrawal, use or transportation of groundwater.

B. An action to recover penalties under this section shall be brought by the director in the superior court in the county in which the violation occurred.

C. In determining the amount of the penalty, the court shall consider the degree of harm to the public, whether the violation was knowing or wilful, the past conduct of the defendant, whether the defendant should have been on no-

tice of the violation, whether the defendant has taken steps to cease, remove or mitigate the violation and any other relevant information.

§ 45-636. Violation; classification

A. Unless otherwise specified, a person who knowingly violates or refuses to comply with a provision of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter is guilty of a class 2 misdemeanor. A person who, after notice of violation, continues in violation of a provision of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter is guilty of a separate offense for each day of violation.

B. A person who knowingly falsifies or renders inaccurate a measuring device required to be installed or maintained under this chapter is guilty of a class 6 felony.

C. A person who knowingly and intentionally withdraws or uses groundwater in violation of this chapter is guilty of:

1. A class 6 felony if the amount of groundwater illegally withdrawn or used is one thousand acre-feet or more.

2. A class 1 misdemeanor if the amount of groundwater illegally withdrawn or used is more than one hundred acre-feet but less than one thousand acre-feet.

3. A class 3 misdemeanor if the amount of groundwater illegally withdrawn or used is one hundred acre-feet or less.

* * * * *

UNCODIFIED PROVISIONS OF CHAPTER ONE, LAWS OF 1980, 4TH SPECIAL SESSION, 34TH ARIZONA LEGISLATURE.

Sec. 172. Nonseverability.

If any portion of this act is finally adjudicated invalid, the entire act shall be null and void. The provisions of this act are intended to be nonseverable.

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
In Banc

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties, Plaintiffs-Appellants, v. THE CITY OF PRESCOTT, a municipal corporation, Defendant-Appellee.	No. 15501

Appeal from the Superior Court of Yavapai County
Cause No. 28568
Honorable Frank X. Gordon, Jr., Judge
Honorable Porter Murry, Judge

MOTION FOR REHEARING

Plaintiffs-Appellants, Town of Chino Valley, a municipal corporation; and Tom M. Sullivan, William J. Wells and Edwin J. Johnson, for and on behalf of themselves and other persons, and legal entities constituting a class too numerous to be named as parites, respectfully move the Court for an Order herein vacating and setting aside the Opinion and Judgement of this Court filed in the Office of the Clerk of this Court, November 30, 1981, finding and adjudging that the Groundwater Management Act of 1980 (Chapter 1, Laws of 1980, Fourth Special Session, Arizona Legislature) to be a valid, constitutional statute and affirming the Order of the Yavapai Superior Court dismissing the Appellants' complaint pending therein for injunctive relief as barred by said 1980 Act. These Appellants respectfully

urge the Court that said 1980 Act grossly contravenes and is facially repugnant to the Fifth Amendment to the United States Constitution as made applicable to state action by the Fourteenth Amendment and to the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution.

Appellants further respectfully urge the Court that its Opinion and Order filed November 30, 1981, sets aside and overturns long established principles of Arizona groundwater law so long established and so universally accepted and relied upon as to constitute a vested property right in groundwater in favor of the owner of the land wherein the water was found. Appellants further urge the Court that the Court's Opinion in rejecting the long established rule that in Arizona the landowner owns the groundwater as part of his land in effect thereby sanctions by that rejection, invidious discrimination facially apparent upon a review of the 1980 Act favoring certain cities and towns, industry and all other users of groundwater for any purpose except the users of groundwater for growing of food and fibre as to which users the Act is grossly invidiously discriminatory.

In an unbroken line of decisions from 1904 to prior to this decision this Court has recognized the common law ownership of groundwater, subject to the reasonable use doctrine, as the law of groundwater ownership and use in Arizona. *State ex rel, Morrison Attorney General, v. Anway*, 87 Ariz. 206, 349 P.2d 774, 1960.

This is a surprising and unpredictable change in the law as previously enunciated by the Court as the law governing property rights in Arizona. The Court has rejected and repudiated the rule declared by this Court in *Maricopa Water Conservation District v. Southwest Cotton Company*, 39 Ariz. 65, 4 P2d. 369 (1931), *Bristor v. Cheatham*, 75

Ariz. 227, 255 P.2d 173 (1953) and followed in many other decisions, that the common law doctrine of groundwater ownership is the law in Arizona, subject to the reasonable use doctrine.

Appellants respectfully urge the Court that its decision thereby contravenes the constitutional guaranties afforded appellants by the Fifth and Fourteenth Amendment to the United States Constitution and should be set aside and vacated and the cause should be reheard.

Justice Potter Stewart, specially concurring in *Hughes vs. Washington*, 389 U.S. 290, observed:

> ..... Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, *no less through its courts than through its legislature*, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Appellants are aware that the Court has probably read and heard all the argument its busy schedule and heavy workload permits. Counsel for Appellants will therefore eschew the role of "weary lawyers with unending tongues" and again urge the Court that the 1980 Act is indeed in our view an outrageous piece of legislation seriously infected with constitutional deficiencies grossly repugnant to the federal constitution; and also to notions of fairness and the even handed treatment due from every governmental agency under our system of government.

We respectfully urge that the Opinion and Judgment rendered herein November 30, 1981, should be vacated and set aside and a rehearing of the cause should be ordered.

RESPECTFULLY SUBMITTED this 14th day of December, 1981.

FRANK J. BARRY, JR.
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ARTICLE 1. COMMON LAW

§ 1-201. Adoption of common law; exceptions

The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.

State of Arizona
Senate
Thirty-third Legislature
First Regular Session
1977

CHAPTER 29

SENATE BILL 1391

* * *

Be it enacted by the Legislature of the State of Arizona:

Section 1. **Legislative findings: declaration of policy**

The Legislature of the State of Arizona finds that strict application of existing law preventing the transfer of groundwater jeopardizes the economy and well-being of the people of this state and prevents certain necessary distribution of Arizona's groundwater resources. The Legislature also finds that in view of the rapid depletion of groundwater in this state it is imperative that a comprehensive long-range plan providing for groundwater management in this state be adopted as soon as possible to assure the reasonable use of groundwater resources in this state and for an equitable and dependable allocation and distribution of such resources to provide maximum benefit for the citizens of Arizona.

Therefore, the Legislature declares that the provisions of this act relating to the transfer of groundwater are immediately necessary for the best interests and welfare of the citizens of this state to maintain the economy of this state, to prevent the loss of jobs, and to provide a dependable water supply for Arizona cities and towns. The Legislature further declares that the provisions of this act are intended to apply only until a comprehensive plan providing for groundwater use, allocation, and distribution is implemented in this state.

* * * * *

§ 45-317.01. Existing groundwater transfers from critical groundwater areas

A. A person who, prior to January 1, 1977, was transferring groundwater from land within a critical groundwater area for reasonable and beneficial use within or from such critical groundwater area designated prior to January 1, 1977, and such person's successors in interest, shall not be enjoined from making such transfer if the transfer is in accordance with a certificate of exemption, as provided in this article. A person injured by such transfer shall be entitled to recover damages pursuant to section 45-317.04.

B. A transfer pursuant to subsection A of this section shall be limited to the same purposes for which the transfer was made prior to issuance of the certificate of exemption and to an annual amount equal to the highest consecutive twelve-month amount which was transferred by such person within the eight years preceding January 1, 1977 and, if an industrial user, to the amount which would have been transferred for the same purposes from pumping and delivery facilities actually in place and capable of production during such twelve-month period but for the temporary availability of alternate supplies actually used; except that the amount specified in the certificate of exemption shall not be less than the amount of the annual use of the retired irrigated land owned or leased by the applicant prior to January 1, 1977 which is or has been retired by June 1, 1977. Notwithstanding section 45-301, as to irrigated land owned or leased prior to January 1, 1977 which is or has been retired by June 1, 1977, by a person transferring groundwater pursuant to subsection A of this section, "annual use" for the purposes of this article means the annual amount equal to the average of the amounts of groundwater withdrawn for the irrigation of such land in the five highest consecutive years, treating only those years in which the land was actually irrigated as consecutive, in the period beginning eight years prior to purchase and ending January 1, 1977. A city or town which, prior to January 1,

1977, was transferring groundwater from a critical groundwater area pursuant to a court order may transfer an amount of groundwater from such critical groundwater area not to exceed the annual use of the irrigated land owned or leased by the city or town prior to January 1, 1977.

C. A person who is transferring groundwater from land within a critical groundwater area designated prior to January 1, 1977 for the irrigation of land within such critical groundwater area and from wells permitted or registered under section 45-304, 45-313 or 45-316, and his successors in interest, shall not be enjoined from transferring the amount of groundwater necessary for irrigation of the crops historically grown on such lands prior to January 1, 1977, and no certificate of exemption shall be required. A person injured by such transfer shall be entitled to recover damages pursuant to section 45-317.04. A person adjudicated to be making transfers to the injury of others and for which damages are awarded shall thereafter file the annual report required pursuant to section 45-317.08 and shall be subject to termination of the right to transfer pursuant to section 45-317.09 as if such transfer were included in a certificate of exemption.

§ 45-317.02. Certain future groundwater transfers from critical groundwater areas

Transfers of groundwater by any person or his successors in interest from retired irrigated land located in any critical groundwater area acquired or leased after January 1, 1977, or acquired or leased prior to January 1, 1977, by persons not making transfers prior to January 1, 1977, for any reasonable and beneficial use within or from the critical groundwater area shall not be enjoined to the extent such transfers do not exceed the annual use of groundwater on such land if such transfers are made pursuant to a certificate of exemption issued pursuant to this article.

§ 45-317.03. Transfers by public service corporations and political subdivisions

A. Cities and towns engaged in the distribution of groundwater primarily for domestic purposes may pump and transfer such water within the service area of such city or town for the benefit of landowners and residents, and no certificate of exemption shall be required. Such transfer of groundwater shall not establish a presumption of injury to others. For purposes of this subsection, "service area" means that area of land actually being served water as of January 1, 1977 plus any additions to such area which contain an operating distribution system owned by the city or town primarily for the delivery of domestic water.

B. Political subdivisions existing as of January 1, 1977, and engaged in the distribution of groundwater primarily for irrigation purposes may pump and transfer such water for the benefit of landowners within the service area of such political subdivision, and no certificate of exemption shall be required. Such transfer of groundwater shall not establish a presumption of injury to others within the political subdivision. For the purposes of this subsection, "service area" means that area of land actually being served water as of January 1, 1977 within the boundaries of the political subdivision plus any additions to such area which contain an operating system of canals, flumes, ditches and other works owned or operated by the political subdivision primarily for the delivery of irrigation water.

C. Public service corporations engaged in the distribution of groundwater primarily for domestic purposes, may pump and transfer such groundwater for the benefit of landowners and residents within the service area of such public service corporation, and no certificate of exemption shall be required. Such transfer of groundwater shall not establish a presumption of injury to others. For the purposes of this subsection, "service area" means that area of land within a certificated area actually being served water as of January 1, 1977 by a public service corporation plus any

additions to such area within the certificated area which contain an operating distribution system owned by the public service corporation primarily for the delivery of domestic water.

D. No service area may be extended primarily for any of the following purposes:

1. Including a well field within the service area.

2. Furnishing disproportionately large amounts of water to industrial or any other large users if such users could not themselves lawfully obtain water from the same sources in the same quantities.

3. Providing agricultural water from inside a critical groundwater area to an area out of such critical groundwater area.

E. Each city, town, other political subdivision and public service corporation engaged in the distribution of groundwater shall furnish to the department maps clearly delineating each service area, distribution system and such other related data as the department may require.

§ 45-317.04. Recovery of damages for injury caused by transfers of groundwater from a critical groundwater area

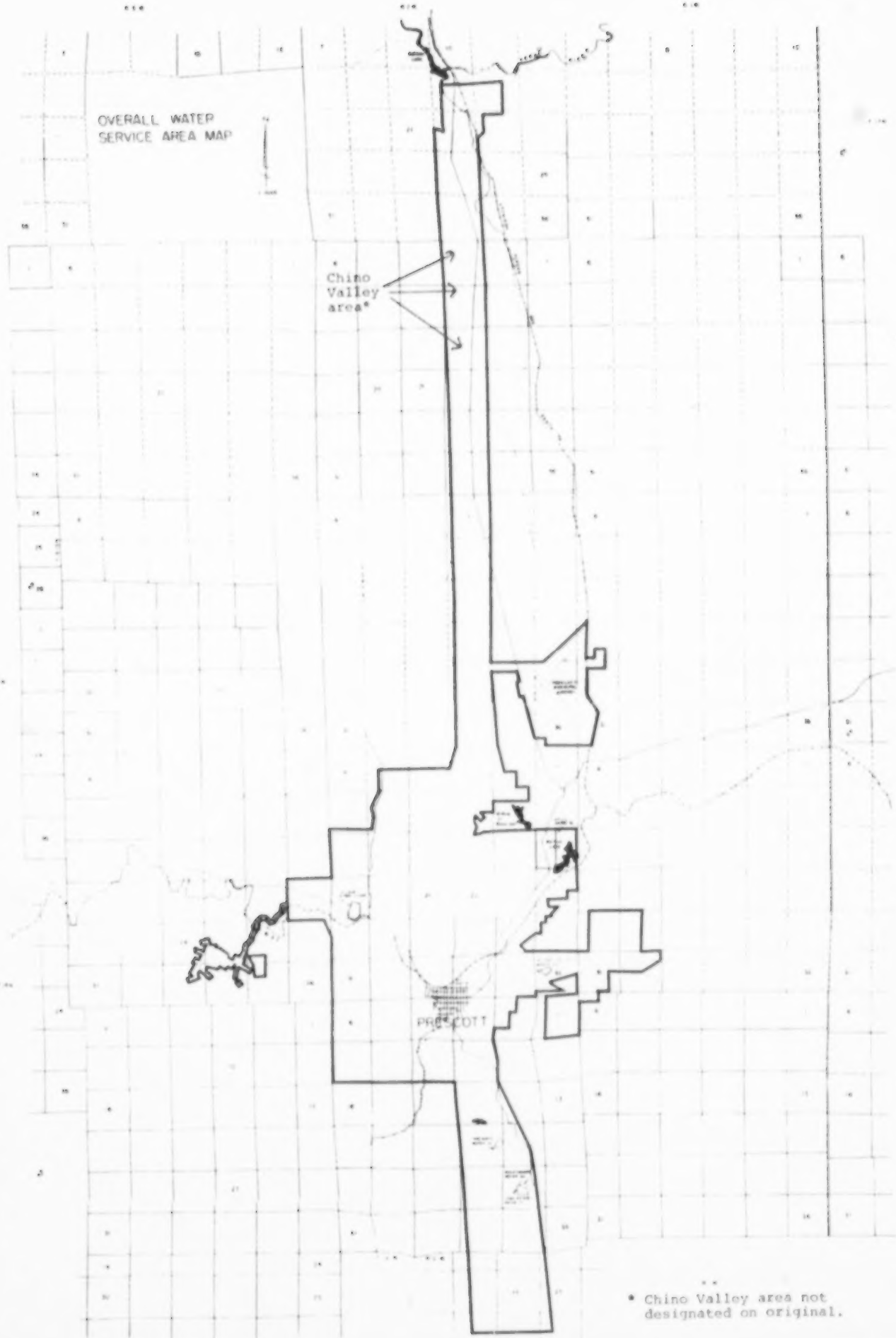
A. Except as provided in Section 45-317.03 and subsection D of this section, nothing in this article shall limit the right of any person to recover damages for any transfer of groundwater within or from a designated critical groundwater area which causes impairment of or damage to his groundwater supply.

B. Except as provided in Section 45-317.03, injury shall be conclusively presumed to have resulted from the transfer and use of groundwater out of the critical groundwater area.

C. If injury is found from the transfer of groundwater within or from a designated critical groundwater area, the court or jury shall consider all relevant circumstances and award damages as are just and reasonable for all past, present and future injury. In addition, the court may if damages are nominal and otherwise shall if damages are substantial award reasonable attorney's fees, expert witness expenses and fees and court costs an offeree of judgment shall not be awarded such fees and expenses incurred after an offer of judgment has been made in accordance with the rules of civil procedure if the final judgment is not more favorable to the offeree than the offer of judgment.

D. Damages shall not be recoverable for transfer of that portion of the annual use of retired irrigated land which would not actually have returned to the water table from the continued use of such water on irrigated land nor shall damages be recoverable for transfers otherwise found to be lawful.

* * * * *



* Chino Valley area not designated on original.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1882

In The
Supreme Court of the United States
October Term, 1981

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties,
Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

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No. 81-1882

In The
Supreme Court of the United States
October Term, 1981

TOWN OF CHINO VALLEY, et al.,

Appellants,

v.

THE CITY OF PRESCOTT,

Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Arizona on the grounds that the questions presented are not ripe for review, the appeal as a whole does not present a substantial federal question, and that the opinion below rests on an adequate non-federal basis.

RESPECTFULLY SUBMITTED THIS 13th day of May, 1982.

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By: Bill Stephens
Bill Stephens
Attorney for Appellee

OPINION BELOW

The decision and judgment of the Arizona Supreme Court in *Town of Chino Valley v. City of Prescott* (herein *"Chino Valley II"*) _____ Ariz. _____, 638 P.2d 1324 (1981) appears in Appendix A.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution:
Amendment Five
Amendment Fourteen
Chapter One, Laws of 1980, 4th Special Session, 34th Arizona Legislature, herein the Groundwater Management Act of 1980. The 1980 Groundwater Code is reproduced in Appendix B.

STATEMENT OF THE CASE

Appellee, the City of Prescott, is a municipality of approximately 25,000 persons, located in Yavapai County, in north central Arizona. One of the appellants, the Town of Chino Valley, an Arizona municipal corporation, is located approximately 15 miles north of the City of Prescott along State Highway 89. Appellants Tom M. Sullivan, William J. Wells and Edwin Johnson are landowners within the Little Chino sub-basin of the Prescott Active Management Area.

It is the appellee's position that the class action part of this appeal is not properly before the United States Supreme Court. The class action part of the suit was dismissed by the trial court on November 3, 1980.[1] The dismissal of the class action part of the suit was never appealed from, and the class was not a party before the Arizona Supreme Court.[2]

The City of Prescott owns 164 acres of land in Chino Valley outside its corporate limits but within its water service area. Prescott is in the business of supplying water to municipal customers in its service area, which includes part of the Town of Chino Valley. The Town of Chino Valley does not provide municipal water service.

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[1] See Appendix F.
[2] See Appendices G and H.

In 1948 Prescott began transporting groundwater to its customers via a pipeline from wells drilled on its Chino Valley land.

In that same year the Arizona State Legislature enacted the 1948 Groundwater Code which placed limits on agricultural pumping of groundwater in certain regions of the state, designated as critical groundwater areas.

The Granite Creek Critical Groundwater area was created by the Arizona State Land Department in 1962, pursuant to provisions of the 1948 Groundwater Code as codified in Arizona Revised Statutes §45-301 *et seq.*, and upon petition by Chino Valley Residents.

The Granite Creek Critical Groundwater Area boundaries followed political boundaries, such as section lines, and did not correspond to natural hydrologic boundaries.[3] The Granite Creek Critical Groundwater Area included the Town of Chino Valley but not the City of Prescott.

In 1970 the Town of Chino Valley was incorporated as an Arizona municipal corporation. In 1972 appellants filed a complaint in Yavapai County Superior Court seeking to permanently enjoin the City of Prescott from withdrawing and transporting in excess of 590 acre feet of groundwater per annum from its wells in Chino Valley to areas outside the Granite Creek Critical Groundwater Area.

The suit was not actively prosecuted over the years. Based upon motions filed by appellee, the suit was formally dismissed on its merits on November 3, 1980.

Prior to the dismissal, the Arizona State Legislature, in 1977, amended the 1948 Groundwater Code. The 1977 amendments were passed as an interim measure until a comprehensive statutory scheme for statewide groundwater regulation and management could be enacted.[4] The 1977 amendments provided a means of allowing existing transferrals of groundwater to continue by the issuance of certificates of exemption, and precluded the issuance of an injunction regarding such transferrals of

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[3] See Appendix J

[4] See Appendix D, 1977 Groundwater Amendments, Section 1.

groundwater if this procedure was followed. The remedy of damages remained available to persons injured by such transfer; however, no presumption of damages remained.

Following the enactment of the 1977 amendments, the City of Prescott applied for, and was issued, a Certificate of Exemption permitting the transfer of 4,169.13 acre feet of groundwater annually from the Granite Creek Critical Groundwater Area to be used by the City of Prescott within its water service area.

The constitutionality of the 1977 Amendments was upheld in a special action to the Arizona Supreme Court in *Town of Chino Valley v. State Land Department, ("Chino Valley I")* 119 Ariz. 243, 580 P.2d 704 (1978).

On or about February 1, 1980, appellee filed a Motion to Dismiss Appellants' Complaint for Injunctive Relief. Appellee's Motion to Dismiss appellants' Complaint for Injunctive Relief was denied in April of 1980.

On June 12, 1980, the Groundwater Management Act of 1980 became effective.[5] The 1980 Act abolished the concept of critical groundwater areas, and established active management areas having boundaries corresponding to natural hydrologic groundwater basins and sub-basins. Under this plan, the Town of Chino Valley and the City of Prescott were both included in the same sub-basin of the same active management area.[6] Further, under §45-541(B) of the 1980 Groundwater Code, groundwater withdrawn by a city may be transported within its service area within a sub-basin of an active management area without payment of damages.

On April 17, 1980 appellee filed a Motion for Reconsideration urging the trial court to dismiss appellants' complaint seeking injunctive relief. After extensive briefing and oral argument, the trial court, on November 3, 1980, granted appellee's motion to dismiss appellants' complaint. The trial court further entered its

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[5] See Appendix B, which contains the 1980 Groundwater Code.

[6] The Prescott Active Management Area is divided into two sub-basins, the Little Chino sub-basin and the Upper Agua Fria sub-basin. The City of Prescott and the Town of Chino Valley are *both* located in the Little Chino sub-basin. See Appendix I.

order dismissing the class action portion of the suit, and allowed appellants 20 days in which to file an amended complaint for damages.[7]

Appellants filed an amended complaint requesting damages, on or about November 15, 1980, in the Superior Court of Yavapai County.

Appellants also filed a Notice of Appeal to the Court of Appeals of the State of Arizona on November 13, 1980. A Petition for Transfer to the Supreme Court of Arizona was filed by appellants on or about May 13, 1981, and was granted June 2, 1981.

During the pendancy of the appeal to the Supreme Court of Arizona, the constitutional issues were thoroughly briefed by the parties as well as by nine amici curiae. The Supreme Court of Arizona entered its Opinion and Judgment on November 30, 1981 affirming the order of the Yavapai County Superior Court dismissing the Town of Chino Valley's complaint to enjoin the City of Prescott from withdrawing groundwater.[8] The Supreme Court of Arizona upheld the constitutionality of the 1980 Groundwater Management Act. Appellants filed a Motion for Rehearing which was denied on January 15, 1982.

Appellants filed a Notice of Appeal to the United States Supreme Court on February 8, 1982, and an Amended Notice of Appeal on February 9, 1982. Appellants filed their Jurisdictional Statement with the United States Supreme Court on April 9, 1982.

Appellants' cause of action seeking damages is pending in the Yavapai County Superior Court.

ISSUES PRESENTED

I. The United States Supreme Court should deny review of this Appeal.

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[7] See Appendix F.

[8] See Appendix A.

A. The United States Supreme Court lacks jurisdiction over any question presented by appellants, because an action for damages in this case is pending in the trial court. Therefore, the decision is not final and is unripe for review.

B. The United States Supreme Court should decline to accept discretionary review over the second and third questions presented by appellants pursuant to petition for writ of certiorari.

II. The appeal does not present a substantial federal question.

A. The breadth of the police power is sufficient to authorize the State to promote the general welfare by the passage of legislation to prevent depletion of groundwater resources.

B. The effect of the 1980 Groundwater Management Act upon appellants' property is insufficient to constitute a taking. Therefore, appellants have not been injured by its passage or its application to them.

C. The 1980 Groundwater Management Act is not retroactive as written or as applied by the Supreme Court of Arizona. Appellants are not deprived of an efficacious remedy for damages incurred prior to passage of the Act.

D. The 1980 Groundwater Management Act is a reasonable effort by the Legislature to deal with the State's compelling need to conserve, manage and allocate groundwater.

III. The 1980 Groundwater Management Act does not depart radically from prior groundwater law, but is consistent with prior Arizona law, decisions of other state courts and decisions by this Court.

A. The decision below is not an arbitrary departure from settled law, but rests upon a fair and substantial basis.

B. The decision below is consistent with decisions by other state courts and decisions by this Court and it does not undermine the integrity of the judiciary in Arizona.

IV. The decision of the Arizona Supreme Court rests on an adequate non-federal basis.

ARGUMENT

I. THE UNITED STATES SUPREME COURT SHOULD DENY REVIEW OF THIS APPEAL.

A. THE UNITED STATES SUPREME COURT LACKS JURISDICTION OVER ANY QUESTION PRESENTED BY APPELLANTS, BECAUSE AN ACTION FOR DAMAGES IN THIS CASE IS PENDING IN THE TRIAL COURT. THEREFORE, THE DECISION IS NOT FINAL AND IS UNRIPE FOR REVIEW.

Title 28, United States Code, §1257 requires finality for the review of judgments or decrees. In *Radio Station WOW v. Johnson,* 326 U.S. 120 (1944), Mr. Justice Frankfurter summarized the main purposes of the finality requirement as follows:

> This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a state court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in state litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree."....This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system. *Id.* at 124.

In *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) the Court held that the finality requirement of 28 USC §1257 serves three purposes. They are: (1) avoiding piecemeal review of state court decisions by federal courts, (2) avoiding the giving of advisory opinions when there may be no real case or controversy and (3) minimizing federal intrusion into state affairs by limiting federal review of state court determinations of federal constitutional issues.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) lists four types of exceptions to the finality rule, but none of them require a Court to decide federal questions which could lead to additional federal questions that would have to be decided at a later date. *Grays Harbor Co. v. Coats-Fordney Co.,* 243 U.S. 251 (1917) recognizes the potential for subsequent litigation and fragmentary review as an important factor in declaring that a judgment is interlocutory, and therefore not final.

The fact that a damages claim is still pending in the trial court renders this appeal analogous to eminent domain proceedings. These are explicitly referred to in *North Dakota* and *Cox* as *not* falling into any exception to the final judgment rule because of their interlocutory nature. In *North Dakota* the Court wrote, "For in those [eminent domain] cases the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Pharmacy Bd v. Snyder's Drug Stores, Inc., supra* at 163 quoted in *Cox Broadcasting Corp. v. Cohn, supra,* at 477-478 (note 6).

Until the damages action has been fully litigated to a conclusion appellee submits the instant case will not be ripe for review.

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1947) involved jurisdictional considerations similar to those in the case *sub judice.* In *Republic,* a producer of natural gas challenged the validity of regulation by the Oklahoma Corporation Commission. The state's highest court upheld the commission's action. The commission's order left some matters for further negotiation and possible court action. The United States Supreme Court declined to accept jurisdiction for five different reasons. First, the subject matter was of peculiarly local concern; the state had an important interest in the regulation of its natural resources. Second, there were still proceedings of substance to be held rather than merely ministerial acts. Third, the appellant would suffer no irreparable injury if review were postponed, although it would incur expenses. Fourth, the continued proceedings might yield more federal questions; the Supreme Court might have to review the case a second time when the new federal questions arose. Finally, the *Republic* Court analogized to the abstention doctrine. The same policies lie behind abstention and the final judgment

rule — to avoid friction between the federal and state courts by not deciding unclear issues of state law before state courts have a chance to do so, to avoid premature adjudication of constitutional questions, fragmentary review, economic waste and delayed justice. *Republic Natural Gas Co. v. Oklahoma, supra.*

The test outlined in *Republic* can be readily applied to the instant case:

1. The subject matter is of great local concern; Arizona has a vital interest in regulating its precious groundwater to assure an adequate supply.

2. There are still major proceedings to be held in the state courts — both the liability for and the amount of damages, if any, remain to be determined and could lead to additional constitutional attacks upon the statute.

3. The Supreme Court may have to review the case a second time if it reviews it now, because of the possibility that federal questions will be raised in the trial court during the damages litigation.

4. Appellants will suffer no irreparable injury before review — they have survived without an injunction or damages since Prescott began pumping in 1948 and none of the water being pumped is being transported out of the hydrologic sub-basin where appellants are located.

5. There are issues of state law still pending in the case. The trial on the damages question is organically part of the same litigation as that which appellants are attempting to appeal. Further, at the conclusion of the pending litigation in the trial court, appellants would still have the opportunity to raise any questions presented in this appeal. The Court should therefore abstain from review at this time.

Consideration of all these facts leads to the conclusion that this case is not final or presently ripe for review.

B. THE UNITED STATES SUPREME COURT SHOULD DECLINE TO ACCEPT DISCRETIONARY REVIEW OVER THE SECOND AND THIRD QUESTIONS PRESENTED BY APPELLANTS PURSUANT TO PETITION FOR WRIT OF CERTIORARI.

Rule 17 of the United States Supreme Court Rules makes it quite clear that: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." The Court should exercise its discretion to deny appellants' petition for writ of certiorari.

As will be discussed in more detail in Argument III, the decision below is fully in accord with cases decided by other state courts and by this Court.

Any result other than the one reached by the court below would create chaos and confusion in the law, and would leave Arizona's most precious natural resource, groundwater, open to exploitation, waste and depletion.[9]

The decision below rested on adequate non-federal grounds and the appeal fails to raise substantial federal questions.

The decision below was fair to all parties and protected their interests. Appellants' rights to withdraw and use groundwater have never been more secure than they are under the present law.

For all of the foregoing reasons, appellants' petition for writ of certiorari should be denied.

II. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. THE BREADTH OF THE POLICE POWER IS SUFFICIENT TO AUTHORIZE THE STATE TO PROMOTE THE GENERAL WELFARE BY THE PASSAGE OF LEGISLATION TO PREVENT DEPLETION OF GROUNDWATER RESOURCES.

Past decisions of this Court demonstrate the proposition that the police power is the broadest and least limitable power of a sovereign. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The police power is fundamental to enable society to respond in an appropriate and effective fashion to changing political, economic and social circumstances, and thus to maintain its vitality and order.

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[9] See Appendix E.

Mugler v. Kansas, 123 U.S. 623 (1887). Therefore, the police power must be as comprehensive as the demands of society require under the circumstances. *Berman v. Parker,* 348 U.S. 26 (1954); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

Appellants seem to confuse the police power, exercised for the benefit of the general public, with the eminent domain power, exercised for the benefit of the state or another individual. The Supreme Court of Arizona recognized this distinction in *Moton v. City of Phoenix,* 100 Ariz. 23, 410 P.2d 93 (1966). The United States Supreme Court distinguished eminent domain from the police power in *Agins v. City of Tiburon,* 447 U.S. 255 (1980), in which it held that a zoning ordinance designed to substantially advance the legitimate governmental goal of discouraging premature and unnecessary conversion of open-space land to urban uses was a proper exercise of the city's police power.

Because its exercise results in a benefit to the public at large, the police power may be legitimately exercised to the extent of interfering with or even destroying the property rights of an individual, who will share in the benefits and burdens of the exercise of the police power. *Agins v. City of Tiburon, supra; Andrus v. Allard,* 444 U.S. 51 (1979); *Goldblatt v. Hempstead,* 369 U.S. 590 (1962). This Court has made it quite clear that exercise of the police power involves preferment of the public interest over the private interest of the individual, even to the extent of the destruction of the latter. *Miller v. Schoene,* 276 U.S. 272 (1928).

Legislation protecting state water resources is within the scope of the police power. *Hudson County Water Co. v. McCarter,* 209 U.S. 349 (1908). In *Hudson County Water Co.* this Court endorsed the use of police power to modify existing riparian rights in surface water. In *California-Oregon Power Co. v. Beaver-Portland Cement Co.,* 73 F.2d 555 (9th Cir. 1934), *aff'd,* 295 U.S. 142 (1935), another surface-water case, this Court affirmed the right of a state legislature to exercise its police power for the purpose of promoting the economic welfare of the community, as well as its peace, health and safety, even when such exercise interferes with private rights.

The police power may also be used to regulate scarce groundwater resources without running afoul of the Fifth and Fourteenth Amendments. *Williams v. City of Wichita,* 190 Kan. 317, 374 P.2d 578 (1962), *cert. denied and appeal dismissed,* 375 U.S. 7 (1963). The *Williams* case involved regulation of groundwater through the exercise of the police power and was strikingly similar to the case at bar. Williams, an irrigator, owned property near the City of Wichita. Wichita purchased plots of land some distance from the city overlying the same acquifer as Williams' land. In compliance with the 1945 Water Appropriation Act, the Chief Engineer of the Division of Water Resources granted the city a permit for pumping from ten new wells. The city proceeded to dig wells on its tracts and transport water to the city, allegedly decreasing the value of Williams' property by lowering the water table.

Williams contended that he had a vested right in the water underlying his land. Therefore, he claimed the 1945 Water Appropriation Act had effected an unconstitutional taking of his property by allowing the city to pump groundwater and had abrogated his prior right to enjoin or obtain damages from the city. The Supreme Court of Kansas dismissed this argument, holding that the state had properly exercised its police power in regulating the withdrawal of groundwater.

B. THE EFFECT OF THE 1980 GROUNDWATER MANAGEMENT ACT UPON APPELLANTS' PROPERTY IS INSUFFICIENT TO CONSTITUTE A TAKING. THEREFORE, APPELLANTS HAVE NOT BEEN INJURED BY ITS PASSAGE OR ITS APPLICATION TO THEM.

Appellants state that they own real property situated within the Prescott Active Management Area. It is unclear whether appellant, Town of Chino Valley, owns land. Appellants argue that if the City of Prescott is allowed to continue transporting groundwater, the value of their property will be diminished. Mere diminution in the value of property as a result of state regulation does not result in a taking.

In *Agins v. City of Tiburon, supra,* this Court held that whether there has been a taking depends upon a determination that

the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. In *Agins* the Court cited *Village of Euclid v. Ambler Realty Co., supra,* as the seminal decision. The *Agins* Court, citing *Euclid,* stated:

> In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development on his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were fairly constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury on the landowner. *Agins v. City of Tiburon, supra* at 261.

In *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978) the Court held that even an extreme decrease in value will not result in a taking as long as the regulations bear a reasonable relationship to promotion of the general welfare. In *Penn Central* the appellants argued that the New York City Landmarks Preservation Law which placed restrictions on the development of a railroad terminal site owned by appellants greatly diminished its value and effected a taking under the Fifth and Fourteenth Amendments. The Court held that the regulations were reasonably related to the promotion of the general welfare and rejected the proposition that diminution in property value, standing alone, can establish a taking. *Penn Central Transportation Co. v. New York City, Id.* at 131. See also *Agins v. City of Tiburon, supra. Penn Central* requires that in determining whether there is a taking, appellants' rights must be viewed as a whole. To make this determination, it is necessary to resolve the precise nature of appellants' property interest prior to the Act compared with the nature of appellants' property interest under the new law.

Prior to the 1980 Act, appellants *did not own the water beneath their lands.* On the contrary, case law is replete with statements confirming the rule that the owner of the land has only a right to capture and use groundwater beneath his property, not a right in the corpus of the water itself. This right is described in

Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla.), *cert. denied*, 444 U.S. 965 (1979), as a usufructory right to capture and use groundwater. A recent Arizona decision on this point is *Town of Chino Valley v. State Land Dept.*, ("*Chino Valley I*"), supra.[10] In *Chino Valley I* the Supreme Court of Arizona explained that:

> Under the doctrine of reasonable use property owners have *the right to capture and use* the underground water beneath their land for a beneficial purpose on that land, but no landowner can transport water off the land from which it came if the transfer injured the water supply of neighboring property owners. *Chino Valley I* at 248, 580 P.2d. at 709 (emphasis added).

The reasonable use rule did not provide appellants with a remedy against neighboring landowners sinking huge wells on their respective lands and literally mining the common supply to extinction.[11]

Subsequent to the 1980 Act, appellants have admittedly lost the possibility of enjoining Prescott from pumping groundwater from land adjacent to appellants' land and transporting it for use by the City of Prescott. In addition, they may no longer receive damages for transportation, subsequent to June 12, 1980, of groundwater within a hydrologic sub-basin of an active management area. However, as stated in *Andrus v. Allard, supra:*

> [W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. *Id.* at 65-66.

The bundle of rights which appellants enjoy under the 1980 Groundwater Management Act includes, but is not limited to, the following strands:

1. Appellants' existing uses of groundwater are expressly

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[10] See Appendix C.

[11] For discussion of the problem, under doctrine of reasonable use, See Appendix E.

recognized by the act as grandfathered rights by Title 45, Chapter 2, Article 5. Furthermore, pursuant to §45-465 appellants will have the right to continue to irrigate land which was legally irrigated at any time during the five years preceding January 1, 1980.

2. Appellants' neighboring landowners no longer have the right to deplete appellants' groundwater source by pumping unlimited quantities from the common reserve. They, like appellants, will be limited to historical usage patterns, modified and restricted by modern conservation practices.

3. Appellants are further protected by provisions which will strictly regulate all new groundwater uses in the active management area, permitting uses only in accordance with a groundwater management plan to be developed by the Department of Water Resources pursuant to Title 45, Chapter 2, Articles 7 and 9.

4. The sale or lease of subdivided or unsubdivided lands, as defined by Ariz. Rev. Stat. §32-2101, within active management areas will no longer be permitted without a showing of a 100-year water supply pursuant to Ariz. Rev. Stat. §45-576, thus providing greater security to appellants' groundwater sources.

5. The City of Prescott will be able to withdraw and transport groundwater only within its service area, pursuant to Title 45, Chapter 2, Article 8, extensions of which are limited by the provisions of Ariz. Rev. Stat. §45-493. All withdrawals by the city are subject to per-capita consumption limitations and the other conservation measures pursuant to Ariz. Rev. Stat. §45-492.

The foregoing rights clearly show a pattern of shared benefits and burdens, demonstrating the existence of an essential aspect of a valid exercise of the police power under *Agins v. City of Tiburon, supra.* When looking at the appellants' bundle of rights, and at their shared benefits and burdens, one cannot reasonably conclude that there has been a constitutional taking of their rights nor a denial of equal protection.

C. THE 1980 GROUNDWATER MANAGEMENT ACT IS NOT RETROACTIVE AS WRITTEN OR AS APPLIED BY THE ARIZONA COURTS. APPELLANTS ARE NOT DEPRIVED OF AN EFFICACIOUS REMEDY FOR DAMAGES INCURRED PRIOR TO THE PASSAGE OF THE ACT.

Arizona Revised Statutes §1-244 provides: "No statute is retroactive unless expressly declared therein." The 1980 Groundwater Management Act was written to apply prospectively.

The 1980 Groundwater Management Act contains no language regarding retrospective application. When applied to the facts of this case, it is clear that the Act is not retroactive, but affects only conduct subsequent to June 12, 1980.

Under Arizona law, a statute has prospective application only, unless it plainly indicates an intent that it have retrospective effect. *Gallo v. Industrial Commission of Arizona,* 83 Ariz. 392, 322 P.2d 372 (1958); *Rodriquez v. Terry,* 79 Ariz. 348, 290 P.2d 248 (1955).

When the appellants initially filed suit in 1972, they sought only to enjoin appellees' future withdrawals of groundwater from the Granite Creek Critical Groundwater Area.

An injunction operates prospectively. Appellants did not actively prosecute their cause of action after the filing of their complaint, but had they done so, and had an injunction been granted prior to the passage of the Groundwater Management Act, that injunction could now be dissolved.

When the law upon which an injunction is based changes, the injunction may be modified or dissolved. See *Pennsylvania v. Wheeling and Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1856). The appellants had no vested right in an injunction or in existing law. In this case, the underlying right, if any, to prevent appellee from transporting water ceased to exist on January 1, 1977, following enactment of the 1977 Amendments to the 1948 Groundwater Code.

The appellants challenged this restriction on issuance of an injunction in a special action before the Supreme Court of Arizona. *Town of Chino Valley v. State Land Department* ("*Chino Valley I*"), *supra.*[12] The court held:

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[12] See Appendix C.

> Parties have no vested right in a particular remedy or mode of procedure and the Legislature may change existing remedies or prescribe new modes of relief provided an efficacious remedy remains. *Id.* at 247, 580 P.2d at 708.

The court found the remedy of damages available under the 1977 Amendments to be an adequate remedy.

In 1980, the enactment of the 1980 Groundwater Management Act established the Prescott Active Management Area which contained a hydrologically determined groundwater basin and two sub-basins. This hydrologically determined area replaced the Granite Creek Critical Groundwater Area designated under the 1948 Groundwater Code, and corresponded to the actual groundwater situation in which Prescott and Chino Valley share a common groundwater supply within a sub-basin.

The 1980 Act provided that no damages would be assessable for transportation of groundwater within a sub-basin of an active management area, as of the effective date of the Act. For this reason, appellants' claim for damages was limited by the trial court to those which could be shown to have accrued prior to the enactment of the 1980 Groundwater Code.

In *General Industries Co. V. Leach,* 173 Ohio St. 227, 181 N.E.2d 39 (1962), the Ohio Supreme Court addressed the problem of a statutory change in the permissible amount of damages which occurred in the midst of ongoing conduct. In that case an employee was laid off and applied for unemployment compensation. His initial benefit was $33.00 per week for a maximum of 26 weeks. After he had received benefits for several weeks the legislature increased weekly unemployment compensation benefits by $9.00 per week.

The constitutionality of the statute was attacked, but the Ohio Supreme Court found that the amendment which increased benefits was prospective and not retrospective in character. The court reasoned that when the employee was first laid off, future payments were not a certainty. Each week the employee was obligated to show his continued unemployment. Since the value of his claim was not fixed by events occurring prior to the enactment of the new statute, the new statute could be applied to the future

weeks of unemployment without resulting in a legislative encroachment on judicial power.

Under Arizona law, a statute is not retroactive in application simply because it may relate to antecedent facts. *Tower Plaza Investments Ltd. v. DeWitt,* 109 Ariz. 248, 508 P.2d 324 (1973).

In *Allen v. Fisher,* 118 Ariz. 95, 574 P.2d 1314 (App. 1977), the Arizona Court of Appeals held that a statute will have prospective operation only unless it appears that it was intended to have retroactive effect, but statutory changes in procedure or remedies may be applied to proceedings already pending except where the statute affects or impairs vested rights.

Prior to the enactment of the 1948 Groundwater Code, appellants had no cause of action relating to the transportation of water across the Granite Creek Critical Groundwater Area boundary because that political boundary did not exist. Appellants had no vested right in prior law and no vested right in the remedy of damages.

Damages, as related to the transportation of groundwater, must be seen as a series of acts, each one resulting in a portion of the total damages claimed. At no time have appellants had a right to future damages, which would have been speculative since appellants had no way of knowing how much water, if any, would be transported in the future.

The 1980 Groundwater Act only affects appellants' claim for damages in the future and does not retroactively serve to affect any claim for damages prior to its enactment.

Since no vested rights were impaired, there can be no denial of due process shown in applying the 1980 Groundwater Management Act to the facts of the present case, nor any validity to the claim that the statute has been applied retrospectively.

D. THE 1980 GROUNDWATER MANAGEMENT ACT IS A REASONABLE EFFORT BY THE LEGISLATURE TO DEAL WITH THE STATE'S COMPELLING NEED TO CONSERVE, MANAGE AND ALLOCATE GROUNDWATER.

The need to protect rapidly diminishing groundwater supplies

in the desert climate of Arizona is discussed in detail in the June 1980 Final Report of the Arizona Groundwater Management Study Commission.[13] In Ariz. Rev. Stat. §45-401, the Arizona Legislature expressly recognized the dangers of failing to regulate groundwater. The legislature therefore evoked its police power to enact a comprehensive statutory scheme to manage, conserve, and allocate Arizona's precious groundwater resources. The threshold question in determining whether the act has a rational basis is whether the means are reasonably related to the legislative ends. *Penn Central Transportation Co. v. New York City, supra.* See also *Goldblatt v. Hempstead, supra,* and *Nebbia v. New York,* 291 U.S. 502 (1933).

There can be no quarrel with the Act's stated conservation purpose, nor is there any serious contention that the Act's comprehensive and integrated management provisions are not reasonably related to that purpose. This Court has made it clear that the reasonableness test is a minimal one, in order to avoid judicial encroachment on the legislative domain. "[D]ebatable questions as to reasonableness are not for the courts but for the legislature..." *Sproles v. Binford,* 286 U.S. 374, 388 (1932). Appellants bear the heavy burden of showing that this legislation is not reasonably related to the solution of Arizona's groundwater problem, or has totally and utterly extinguished, without compensation, their right to continue to extract and use groundwater. Any doubts must be resolved in favor of the Act's validity. *Toombs v. Citizens Bank of Waynesboro,* 281 U.S. 643 (1930). Appellee respectfully submits that appellants cannot meet this burden.

The words of Justice Frankfurter calling for judicial restraint in *American Federation of Labor v. American Sash and Door Co.,* 335 U.S. 538, 553 (1949) (concurring opinion) are worthy of note.

> Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophesy in actual operation. It may not prove good, but it may prove innocuous.

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[13] Excerpts from the Final Report are printed in Appendix E.

> But even if a law is found wanting at trial, it is better that its defects should be demonstrated and removed than the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests — the people.

How effective the 1980 Act will be in preventing depletion of Arizona's groundwater reserves remains to be determined. It is certain that leaving groundwater unregulated would lead to disaster. The appellees urge judicial restraint so that the people of Arizona, through their elected representatives, will have the final say as to the regulation of this vital natural resource which must be preserved for future generations of Arizonans.

III. THE 1980 GROUNDWATER MANAGEMENT ACT DOES NOT DEPART RADICALLY FROM PRIOR ARIZONA LAW, DECISIONS OF OTHER STATE COURTS AND DECISIONS OF THIS COURT.

A. THE DECISION BELOW IS NOT AN ARBITRARY DEPARTURE FROM SETTLED LAW, BUT RESTS UPON A FAIR AND SUBSTANTIAL BASIS.

Appellants' Statement of the Case contained a lengthly historical overview of Arizona case law concerning water rights. This overview was included to support appellants' position that the decision of the Supreme Court of Arizona rendered in this case was a surprising departure from settled groundwater law.

The appellee submits that the issue of the exact nature of the right which an owner may have in groundwater beneath his land has never been determined prior to the present case. Further, the history of Arizona water law demonstrates the unsettled nature of groundwater law throughout much of the state's history.

Appellants cite *Howard v. Perrin*, 8 Ariz. 347, 76 P. 460 (1904) to establish that groundwater belongs to the owner of the land. The issue before the court in that case was whether the plaintiff could substantiate his claim that he had appropriated water in a definite underground channel, pursuant to the Laws of 1893, Act 86. The court ruled against the plaintiff, finding insufficient evidence that a "subterranean stream with defined channels or banks" existed.

The case included a comment by the court that waters percolating through the soil are the property of the owner of the soil. Since this question was not before the court, nor was this finding necessary to the decision in the case, the statement concerning groundwater was dicta, and without the force of adjudication. See *Humphrey's Executor v. United States,* 295 U.S. 602 (1935); *Bardes v. Hawarden Bank,* 178 U.S. 524 (1900); *Garvey v. Trew,* 64 Ariz. 342, 170 P.2d 845 (1946).

In a later case which involved diversion of surface waters which were stored for use in irrigation, as well as the issue of proving existence of an underground stream, the Arizona Supreme Court referred to *Howard v. Perrin, supra,* and repeated the comment on groundwater ownership. *Maricopa County Water Conservation District No. 1 v. Southwest Cotton Co.,* 39 Ariz. 65, 4 P.2d 369 (1931). In this case, as in *Howard v. Perrin, supra,* the issue of rights in groundwater was not before the Court, and any comment thereon was without precedent, and was dicta repeated.

In 1952, the Supreme Court of Arizona overruled its previous decisions concerning ownership of groundwater, whether dicta or otherwise, and held that percolating groundwaters belonged to the public and were subject to appropriation. *Bristor v. Cheatham,* ("*Bristor I*") 73 Ariz. 228, 240 P.2d 185 (1952). In reaching this decision the Court noted that an 1877 Act of Congress, the Desert Land Act, 43 U.S.C. §321, had previously declared percolating waters in the desert lands of the Southwest, including lands in Arizona, to be public. Referring to earlier decisions, the Court stated:

> We are confident that if this court's attention had been called to the act of Congress of March 3, 1877, known as the Desert Land Act, chapter 107, 19 St. at L. 377, U.S.C. Title 43, Sec. 321, 43 U.S.C.A. §321, either in the case of *Howard v. Perrin* or subsequent cases relating to the same subject matter, the court would have reached a different conclusion. To not do so would have resulted in the court totally ignoring the plain language of the act of Congress, *supra.* This it did not have the constitutional authority to do. In doing so it entered the field of legislation resulting in

effect in setting aside a valid act of Congress. *Bristor I, supra* at 235, 240 P.2d at 189.

On rehearing, however, with one new judge having been elected, the court reversed its opinion and held that groundwater was not subject to appropriation, and once again referred to the common law right to the use of groundwater as enunciated in *Howard v. Perrin, supra. Bristor v. Cheatham,* ("*Bristor II*") 75 Ariz. 227, 255 P.2d 173 (1953).

The Court further held that the doctrine of reasonable use would be applied to withdrawal of groundwater, ignoring the fact that the legislature had enacted a Groundwater Code in 1948.

It was noted in *Bristor II* that the legislature did possess police power which it could use for the general welfare, and that police power had been used in numerous instances to limit the exercise of property rights. *Id.* at 234-235, 255 P.2d at 177-178.

The dissenting justices vigorously protested this reversal and found the prevailing opinion to be in irreconcilable conflict with the Desert Land Act of 1877 and the case holdings in the majority of the arid states in the West.

Neither of the "Bristor" opinions specifically referred to the 1948 Groundwater Code or passed on its constitutionality. However, Justice Phelps, writing for the majority in *Bristor I* noted that adherence to the rule enunciated in *Howard v. Perrin* would shackle the legislature from enacting a groundwater code. *Bristor v. Cheatham,* ("*Bristor I*") 73 Ariz. at 235, 240 P.2d at 189 (1952). In 1955, the Arizona Supreme Court held the 1948 Groundwater Code to the constitutional. *Southwest Engineering Co. v. Ernst,* 79 Ariz. 403, 291 P.2d 764 (1955). Southwest Engineering Co. had claimed that the state could not interfere with its existing rights to use groundwater without affecting an unconstitutional deprivation of property.

The Court answered the question, which it said had been left open in *Bristor II*, as to the right of the state against individuals to regulate the consumption of groundwater in the interest of the general welfare.

The court stated:

> It can thus be seen that a conflict occurs between appellant and the state by reason of the interest of the public in the preservation from destruction of a resource essential to the sustenance of life. Where the public interest is thus significantly involved, the preferment of that interest over the property interest of the individual even to the extent of its destruction is a distinguishing characteristic of the exercise of the police power. *Id.* at 409, 291 P.2d at 768.

Due to the absence of grandfathered rights, the impact of the court's decision was far harsher on Southwest Engineering Co. than is the application of the 1980 Act on the appellants in the present case. Southwest Engineering was entirely prohibited from drilling any new irrigation wells on its land with which to irrigate its holdings and was not entitled to any compensation, damages or injunctive relief. This despite the contention that Southwest Engineering Co. ostensibly had vested rights in the percolating groundwater beneath its lands.

The difficulties inherent in applying the reasonable use doctrine to situations on a case-by-case basis was well demonstrated in *Farmers Investment Co. v. Bettwy ("FICO")*, 113 Ariz. 520, 558 P.2d 14 (1976). In *FICO*, Farmers Investment Co. sought to enjoin Anamax Mining Co. from pumping groundwater from beneath land it owned in a critical groundwater area for use in its milling operation three miles away. The court held that water may not be pumped from one parcel to another just because both overlie the common source of supply if the plaintiff's lands or wells upon his lands thereby suffer injury or damage, despite Anamax's assertion that the use was reasonable.

The court noted that the legislature had already acted in expressing the state's policy preferring domestic and municipal users of groundwater over irrigation and stock watering. The court invited the legislature to enact further legislation in this area stating:

> If it is to the State's interest to prefer mining over farming, then the Legislature is the appropriate body to designate when and under what circumstances such economic interest will prevail. *Id.* at 527, 558 P.2d at 21.

In 1977, following the *FICO* decision, the Legislature amended the 1948 Groundwater Code, allowing transportation of groundwater under certificates of exemption. It was recognized that the 1977 Amendments were only an interim solution, since transportation of groundwater was only one aspect of total groundwater management. The 1977 Amendments included provisions establishing the Groundwater Management Study Commission which was given the task of developing a comprehensive groundwater management code for Arizona.[14]

The constitutionality of the 1977 Amendments was challenged in *Chino Valley I, supra.* The Arizona Supreme Court upheld the constitutionality of the statute which barred injunctive relief but permitted appellants to recover damages. The Court also commented on ownership rights in groundwater, stating that the property owners had the right to capture and use groundwater beneath their land.

The 1980 Groundwater Code became law on June 12, 1980, and its constitutionality was subsequently challenged in the present case. In its opinion, the Supreme Court of Arizona focused on the precise nature of the right which the owner of overlying lands has to the waters beneath, stating that previous language on that issue was dicta and therefore not controlling. Chief Justice Struckmeyer, in his opinion below, stated:

> Dictum thrice repeated is still dictum. It is a court's statement on a question not necessarily involved in the case and, hence, is without force of adjudication. 638 P.2d at 1327.

The court held that there is no right of ownership of groundwater prior to its capture, and that the right of the owner of the overlying land is simply to the usufruct of the water. Appellants' claim of vested rights in the corpus of the water was rejected, and the constitutionality of the 1980 Groundwater Code was upheld.[15]

Arizona groundwater law has long been a subject of controversy, as the historical overview of case decisions indicates, and therefore the 1981 decision in *Chino Valley II* was not a departure from settled principles of law.

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[14] Appendix D, 1977 Amendments, Sec. 7.

[15] See Appendix A.

Even if there had been a settled rule of property, as appellants claim, the Legislature nevertheless had the authority to enact legislation to modify such a rule.

In *Broad River Power Co. v. South Carolina,* 281 U.S. 537 (1930), this Court reviewed a judgment of the Supreme Court of South Carolina which compelled the operation of an electric street railway as part of a franchise authorized by a state statute. The Supreme Court of South Carolina held that the public interest demanded that the railway be operated, even though it was alleged to be unprofitable. The United States Supreme Court dismissed the writ of certiorari, finding a substantial state ground to uphold the state statute, despite appellant's claim that the statute so departed from established principles as to constitute a taking.

A more recent case, *Williams v. City of Wichita, supra,* affirmed this concept. Quoting language contained in the opinion in *Baumann v. Smrha,* 145 F. Supp. 617 (D. Kan.), *aff'd,* 352 U.S. 863 (1956) the Supreme Court of Kansas held:

> There is no vested right in the decision of a court and a change of decision does not deprive one of equal protection of the law or property without due process of law.
>
> Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment.
>
> The Fourteenth Amendment in guaranteeing equal protection of the law does not assure uniformity of judicial decisions or immunity from judicial error. Likewise it is well settled that a legislature may change the principle of the common law and abrogate decisions made thereunder when in the opinion of the legislature it is necessary in the public welfare.
>
> Adequate water supply is a necessity. In the arid and semi-arid regions of the West it is imperative that all available water be utilized beneficially and without waste. The accomplishment of those ends is well within the competency of the legislature. *Williams v. City of Wichita, supra* at 337-338, 374 P.2d at 593.

Even if appellants' argument is accepted that a rule of property had been established by case law, the legislature clearly had a substantial basis which would support departure from that rule in the public interest.

B. THE DECISION BELOW IS CONSISTENT WITH DECISIONS BY OTHER STATE COURTS AND DECISIONS BY THIS COURT, AND IT DOES NOT UNDERMINE THE INTEGRITY OF THE JUDICIARY IN ARIZONA.

When the 1980 Groundwater Management Act was enacted, the legislature set forth its declaration of policy in Ariz. Rev. Stat. §45-401. It declared:

> A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.
>
> B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

This policy is consistent with that of many other states whose legislatures have adopted similar legislation relating to the regulation of water resources. In most instances, recognition of the need to regulate water usage or withdrawal involved some adjustment of private interests, and had raised questions of whether these adjustments effected a "taking" of previously recognized property rights.

The courts hearing these questions have consistently taken the view that legislation necessary to adapt the law to changing needs and conditions is well within the police power of the state.

In Oregon, riparian water rights were historically recognized, but in 1909, by statute, these rights were abruptly extinguished. In upholding the Oregon Water Code of 1909, the 9th Circuit Court of Appeals held that water rights "are subject to the police power of the state and within reasonable limits may be modified by legislation passed in the interest of the general welfare." *California-Oregon Power Co. v. Beaver-Portland Cement Co., supra* at 562.

The Kansas legislature abolished the rule of reasonable use of groundwater in 1945 and substituted a permit system of water rights. The Kansas Water Appropriation Act was held constitutional by both the Kansas and United States Supreme Courts in two separate cases. *Baumann v. Smrha, supra; Williams v. City of Wichita, supra.*

In 1955 the South Dakota legislature also substituted a permit system based on prior appropriation for the previous rule of reasonable use. In *Knight v. Grimes,* 80 S.D. 517, 127 N.W.2d 708 (1964), the South Dakota Supreme Court upheld the new statutes against a constitutional challenge. Borrowing the language of the court used in *Southwest Engineering Co. v. Ernst, supra,* the South Dakota court held:

> Where the public interest is thus significantly involved, the preferment of that interest over the property interest of the individual even to the extent of its destruction is a distinguishing characteristic of the exercise of the police power .... *Knight v. Grimes, supra* at 523, 127 N.W.2d at 711.

Also in 1955, the North Dakota legislature declared its state's groundwater subject to an appropriation system. In *Baeth v. Hoisveen,* 157 N.W.2d 728 (N.D. 1968) the Court held the new law a proper exercise of police power, and not a taking of water rights enjoyed prior to 1955.

Idaho's courts have also upheld their state's 1951 Groundwater Act as consistent with a constitutionally enunciated policy

of promoting optimum development of water resources in the public interest. The Supreme Court of Idaho noted in its decision: "Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1973).

In 1981, the Supreme Court of Nebraska upheld a Nebraska statute which conditioned transfer of Nebraska groundwater across the state line into Colorado on receipt of a permit from the director of the Department of Water Resources. The court held that the specific statute set up a reasonable classification of persons which is reasonably related to a legitimate state interest in preserving Nebraska's underground water supply for the beneficial use of its citizens, and that it operated equally on all members of the affected class. *State ex rel Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981).

The Florida Supreme Court recently addressed the question of "ownership" of percolating groundwater. In *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663 (Fla. 1979), the Court held that the right of the owner of the land to groundwater underlying the land is to the *usufruct* of the water and not to the water itself; ownership of land does not carry with it any ownership of vested rights to underlying groundwater not actually diverted and applied to beneficial use.

In that case landowners, Jupiter Inlet Corp., had sought an injunction and damages from the Village of Tequesta on the theory that defendant's groundwater depleted the water supply under Jupiter's property. Prior to this ruling of the Supreme Court of Florida, the "reasonable use" rule was applied to the removal of percolating groundwater in Florida. Having ruled that no vested rights were affected, the *Tequesta* court further held that the landowners had no constitutionally protected property right in percolating groundwater.

The cases cited all concluded that legislation which limits or regulates the right to use underlying water is permissible, and like zoning legislation, does not constitute a "taking". State legislatures are authorized and have a duty to regulate scarce

natural resources, such as water, which are essential to the well-being of the citizenry, and may abolish old rules and adopt new legislation which is necessary to safeguard the supply of those resources for present and future generations.

IV. THE DECISION OF THE ARIZONA SUPREME COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The decision below concerns the validity of a state regulation to conserve groundwater in the desert climate of Arizona. As such, the subject matter is peculiarly of local concern and one in which the state has a very important interest. *Republic Natural Gas Co. v. Oklahoma, supra.*

Property rights do not arise out of the United States Constitution, but from state law. In *Board of Regents v. Roth,* 408 U.S. 564 (1972), the Court stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Id.* at 577.

In the opinion below, the Arizona Supreme Court has for the first time directly addressed the question of the nature of the rights under state law which the appellants have in groundwater. The court's opinion in *Chino Valley II* holds that appellants have no property rights to groundwater, but do have a usufructory right to capture and use groundwater in compliance with state regulations. This holding represents an adequate and independent state ground for the decision of the Arizona Supreme Court that a taking of appellants' property without due process or payment of just compensation has not occurred.

In *Broad River Power Co. v. South Carolina, supra,* the Court determined that a South Carolina law, passed for the dominant purpose of authorizing a merger, was supported by a substantial non-federal basis and so dismissed it from review. The Court in *Broad River* applied the rule that legislative acts must be construed so that any ambiguity or doubts as to their meaning and purpose must be resolved in favor of the public interest.

This Court has further stated:

> Where the judgment of the state court rests on two grounds, one involving a federal question and the other not... and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Lynch v. New York,* 293 U.S. 52, 54-55 (1934).

This rule should be applied by the Court to the present appeal to sustain the decision of the Supreme Court of Arizona on an adequate non-federal basis.

CONCLUSION

For the reasons above set forth, it is respectfully requested that this appeal be dismissed or, in the alternative, that the judgement be affirmed, because the questions presented by appellants are not ripe for review, the appeal as a whole does not present a substantial federal question, and the opinion below rests on an adequate non-federal basis.

RESPECTFULLY SUBMITTED THIS 13th day of May, 1982. May, 1982.

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Supplemental Brief

Office - Supreme Court, U.S.
FILED
MAY 26 1982
...AS.

No. 81-1882

In The
Supreme Court of the United States
October Term, 1981

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties,
Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

APPELLEE'S SUPPLEMENTAL BRIEF

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OPINION OF THE ATTORNEY GENERAL OF ARIZONA

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ON APPEAL FROM THE SUPREME COURT OF ARIZONA

APPELLEE'S SUPPLEMENTAL BRIEF

INTRODUCTION

Pursuant to the Revised Rules of the Supreme Court of the United States, Rule 16.6, appellee, City of Prescott, hereby submits its Supplemental Brief in response to appellant's Objection to Motion for Leave to Intervene.

ARGUMENT

I. THE ISSUE OF THE IMPACT OF THE 1980 GROUNDWATER MANAGEMENT ACT UPON THE VALUE OF STATE TRUST LANDS IS NOT BEFORE THE COURT AND HAS BEEN IMPROPERLY RAISED BY APPELLANTS.

Appellants appear to have raised the issue of the impact of the 1980 Groundwater Management Act[1] upon the value of state trust lands, by reference to a letter dated May 17, 1982, from Bob Corbin, Attorney General of the State of Arizona, to Mr. Wesley Steiner, Director of the Arizona Department of Water Resources. This letter was included by appellants in Appendix A, which was attached to their Objection to Motion for Leave to Intervene filed on May 18, 1982.

The state trust lands issue has no bearing on the facts of the present case and the impact of the 1980 Groundwater Code on these lands was not passed on by the Arizona Supreme Court in the opinion below. Never before in the 10 year history of this litigation has the issue of the state trust lands been raised, and it is therefore untimely raised at this time.

On appeal from a state court, the United States Supreme Court will not decide a question which the appellant did not submit to the courts below. *Tacon v. Arizona,* 410 U.S. 351 (1973); *Shadwick v. City of Tampa,* 407 U.S. 345 (1972).

II. APPELLANTS HAVE NO PERSONAL STAKE IN THE OUTCOME OF THE ISSUE OF THE IMPACT OF THE 1980 ACT ON STATE TRUST LANDS.

Even if appellants had timely presented the issue, they lack standing to raise it. To demonstrate standing, the party seeking to invoke jurisdiction must first have alleged "a personal stake in the outcome of the controversy." *Baker v. Carr,* 369 U.S. 186, 204 (1962), quoted in *Sierra Club v. Morton,* 405 U.S. 727, 732 (1972). Secondly, the party claiming standing must show "some threatened or actual injury resulting from the putatively illegal

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[1] The 1980 Groundwater Management Act, Chapter 1, Laws of 1980, 4th Special Session, 39th Arizona Legislature.

action." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). See also *Data Processing Service v. Camp*, 397 U.S. 150, 151-154 (1970); *Sierra Club v. Morton, supra.* at 738; *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975).

Appellants herein have failed to allege such a personal stake, or any threatened or actual injury to themselves from the allegedly unconstitutional impact upon state trust lands. Having failed to show any personal stake or any threatened or actual injury, appellants lack standing to raise this issue.

III. THE ATTORNEY GENERAL OF ARIZONA HAS NOT PROPERLY ENTERED AN APPEARANCE IN THE CASE AT BAR.

The Attorney General of Arizona has filed no pleadings in the action and has not even directly addressed the Court by letter. He has sent the Court a copy of his letter of May 17 to Mr. Wesley Steiner, Director of the Arizona Department of Water Resources, in which he expressed his personal doubts concerning the constitutionality of the 1980 Act with respect to state trust lands.

The Attorney General's expressions of personal or official interest about the effect of the Act on certain lands administered by the State Land Department should not prejudice the State in the defense of laws enacted by its Legislature in the interest of the general public welfare.

The Attorney General's duties are strictly those bestowed on him by statute. This was the precise holding in *Shute v. Frohmiller*, 53 Ariz. 483, 90 P.2d 998 (1939), in a challenge to a provision similar to A.R.S. §45-104(G). There the Court held that the Legislature, pursuant to article 5, sections 1 and 9 of the Arizona Constitution, has full and complete power to add to or subtract from the duties and powers of the Attorney General.

In the present case, the Legislature, as in *Shute*, has removed from the Attorney General any authority to represent the State of Arizona in litigation concerning the affairs of the Department of Water Resources unless he is asked to do so by the director. He was not asked. His suggestions about whether and in what capacity the State should appear in this appeal are without legal significance.

In addition, the position adopted by the Attorney General in his letter to Mr. Steiner was taken without prior consultation with the Acting State Land Commissioner, and is contrary to the view previously expressed by the Commissioner and his predecessor. The Attorney General may act with regard to the affairs of the State Land Department only as its lawyer, nothing more. He lacks the power to act contrary to the wishes of his client department. *Santa Rita Mining Co. v. Department of Property Valuation*, 111 Ariz. 368, 371, 530 P.2d 360, 363 (1975).

If the Attorney General senses a conflict between his oath of office to uphold the Arizona Constitution, article 10 §1[2], and his duty, if called upon, to uphold the laws of the state, he should remain neutral because he is sworn by law to uphold both.

> The Attorney General under the Arizona Constitution is classified as an executive officer of the state government and therefore, he exercises no legislative or judicial authority. The Attorney General cannot make a conclusive declaration as to the constitutionality or unconstitutionality of a law. That authority is conferred by the [Arizona] Constitution solely upon the judicial branch of the government and, in finality, upon the Supreme Court of the State. [1960] Op. Ariz. Att'y Gen., No. 60-50.

Appellee respectfully submits that the Court may properly disregard the unofficial comments made by the Attorney General of Arizona in his May 17th letter since such comments were not properly presented to the court.

IV. THE ARIZONA DEPARTMENT OF WATER RESOURCES HAS PROPERLY REQUESTED LEAVE TO INTERVENE ON BEHALF OF THE STATE OF ARIZONA.

Provisions of 28 U.S.C. §2403(b) permit the state to intervene to present argument in any action, suit or proceeding in a court of the United States to which a state or any agency, officer or employee is not a party, wherein the constitutionality of any statute of that state affecting the public interest is drawn in question.

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[2] Ariz. Const., art. 10 §1 is the part of the Arizona Constitution which places trust responsibilities for certain lands upon the state.

To facilitate such intervention, this statute provides that the court shall certify the fact of such an action to the attorney general of the state. The statute does not, however, specifically limit the right of intervention to the attorney general of the state. The language of the statute merely states that the court "shall permit the *state* to intervene." 28 U.S.C. § 2403(b) (emphasis added).

Under Arizona law, the Department of Water Resources is empowered with the authority to employ legal counsel and to represent the state of Arizona in litigation which concerns that department.

A.R.S. §45-104(G) specifically sets forth the right of the legal counsel employed by the director of water resources to represent the state.

> The director may employ legal counsel to advise him, represent the department in connection with legal matters before other departments and agencies of this state, and represent the department *and this state* in litigation concerning affairs of the department. A.R.S. § 45-104(G) (emphasis supplied).

A.R.S. §45-103 provides that the Department of Water Resources, through the director, "succeeds to the authority, powers, duties and responsibilities of the [Arizona water] commission and the state water engineer relating to surface water, groundwater, dams and reservoirs." To the extent provided in Title 45, the Groundwater Code, the director has general control and supervision of surface water and groundwater. It is difficult to imagine any more compelling matter in the affairs of the department than that of defending the constitutionality of the statutory provisions by which the state groundwater may be managed, protected and conserved.

The interests of the department and the state are one and the same where regulation and management of water resources are concerned. Statutory language clearly permits the director to act to employ legal counsel to represent the department and the State of Arizona in this litigation.

The director of the Department of Water Resources has

properly filed a Motion for Leave to Intervene on behalf of the State of Arizona. Appellee, City of Prescott, supports this Motion and urges that the Court permit the state to intervene as an appellee and to respond to the Jurisdictional Statement.

CONCLUSION

For the reasons set forth herein, appellee, City of Prescott, respectfully submits that the issue of the impact of the 1980 Groundwater Management Act on the state trust lands not be considered by the Court for the reasons that it was untimely and improperly raised and was not passed on by the lower court.

Appellee further urges the Court to grant the Motion for Leave to Intervene submitted by the State of Arizona.

RESPECTFULLY SUBMITTED THIS 25th day of May, 1982.

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Appendix

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Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER
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No. 81-1882

In The
Supreme Court of the United States
October Term, 1981

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties,
Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM
APPENDICES

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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In Banc

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and Edwin J. Johnson, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties. Plaintiffs-Appellants, v. THE CITY OF PRESCOTT, a municipal corporation, Defendant-Appellee.	No. 15501

Appeal from the Superior Court of Yavapai County
Cause No. 28568
Honorable Frank X. Gordon, Jr., Judge
Honorable Porter Murry, Judge

AFFIRMED

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STRUCKMEYER, Chief Justice

This appeal is from an order of the Superior Court of Yavapai County dismissing the Town of Chino Valley's complaint to enjoin the City of Prescott from withdrawing groundwater from the Granite Creek Critical Groundwater Area. Order of the Superior Court affirmed.

The Town of Chino Valley lies approximately fifteen miles north of the City of Prescott in Yavapai County, Arizona. Prescott owns 164 acres of land in the Chino Valley. In 1948, it drilled wells on some of its Chino Valley property and began transporting groundwater through a seventeen-mile pipeline to its municipal customers. In 1962, pursuant to a petition by Chino Valley residents and A.R.S. § 45-301 et seq., the State Land Department established the Granite Creek Critical Groundwater Area. On September 20, 1970, the Town was incorporated. It was within the Granite Creek Critical Groundwater Area and it owned lands and was withdrawing groundwater from the same underground basin as Prescott. Prescott, itself, was not within the Granite Creek Critical Groundwater Area.

This action was filed on August 21, 1972, seeking to enjoin the pumping of groundwater by Prescott. It did not seek damages for the unlawful pumping or transportation of groundwaters. The lawsuit proceeded at a desultory pace until the order of dismissal on November 3, 1980. Meanwhile, in 1977 the Legislature amended the Arizona Groundwater Code. The Town in 1978 brought an original action in this Court which challenged the constitutionality of the prohibitions against injunctive relief contained in the 1977 amendments. That challenge was rejected. *Town of Chino Valley v. State Land Department,* 119 Ariz. 243, 580 P.2d 740 (1978).

Thereafter, in June of 1980, the Legislature enacted the Groundwater Management Act, herein called the Act or

the 1980 Act*. It repealed the 1977 amendments and abolished critical groundwater areas, substituting geographic units of groundwater management called Active Management Areas and Irrigation Non-Expansion Areas. Certain areas which had been declared critical groundwater areas under former laws were included in the Active Management Areas. By A.R.S. § 45-411(A)(3), the Prescott Active Management Area was established. It includes the Little Chino and Upper Agua Fria sub-basins. Both the Town of Chino Valley and Prescott are within the Little Chino Sub-basin of the Prescott Active Management Area.

By A.R.S. § 45-541(A) of the 1980 Act, transportation of groundwater is allowed within a sub-basin of an Active Management Area. Prescott, being within the Little Chino Sub-basin from which it was drawing water, moved for dismissal of the Town's complaint for injunctive relief. The Superior Court granted Prescott's motion, but ordered that the Town have twenty days in which to file an amended complaint specifying any damages. The Town's appeal from that portion of the trial court's order dismissing appellants' claim for injunctive relief is based upon the asserted unconstitutionality of the Act of 1980 since the Act, by permitting the transportation of groundwater, legitimatizes the prospective withdrawal of groundwater from the Little Chino Sub-basin by Prescott. Appellants' principal attack is that the Act takes property without due process of law and without just compensation. The Act is also challenged on the grounds that it is a legislative encroachment on judicial powers and that it violates art. 5, part 2, § 13 of the Arizona Constitution in that there are provisions in the Act of 1980 which were not included in the title of the Act.

By the Constitution of Arizona, art. 17, § 1, effective at statehood in 1912, it was provided that the common law doctrine of riparian water rights "shall not obtain or be of any force or effect in the State." *See Brasher v. Gibson*, 101 Ariz. 326, 330, 419 P.2d 505, 509 (1966). Thereafter,

in 1919, the Arizona Legislature provided that the water of all sources falling in streams, canyons, ravines, natural channels or definite underground channels belonged to the public and were subject to appropriation for beneficial use. Waters percolating beneath the soil were not included among those subject to appropriation. Appellants rely on the cases of *Howard v. Perrin,* 8 Ariz. 347, 76 P. 460 (1904), and *Maricopa County Water Conservation District No. 1 v. Southwest Cotton Co.,* 39 Ariz. 65, 4 P.2d 369 (1931), for their basic proposition that they own the water percolating beneath their lands under the doctrine of reasonable use.

The Territorial Supreme Court, in *Howard v. Perrin,* commented:

> "Throughout the Pacific Coast, where the doctrine of appropriation obtains, the decisions are uniform to the effect that waters percolating generally through the soil beneath the surface are the property of the owner of the soil***." 8 Ariz. at 353, 76 P. at 462.

Howard v. Perrin was a case in which Howard's grantor went upon unsurveyed lands and sank a well, developing a flow of water which he conducted to some water troughs and a reservoir. About six years later, Howard posted a notice that he had appropriated water from a definite underground channel pursuant to the Laws of 1893, Act 86. The issue was whether the waters which Howard claimed to have appropriated were in a definite underground channel or, as the court said: "constituted a running stream flowing in natural channels between well-defined banks***." 8 Ariz. at 353, 76 P. at 462. It was held that Howard, having alleged an appropriable subterranean stream, had the burden of proof to establish that fact by competent evidence. The court said it failed "to find sufficient evidence in the testimony of the witnesses***to establish the existence of 'a subterranean stream with well-defined channels or banks,'***." *Id.* at 354, 76 P. at 463. Palpably the state-

ment that waters percolating through the soil beneath the surface are the property of the owner of the soil is dictum.

Maricopa County Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), was also a case in which it was determined that the proof did not establish an underground stream so as to permit appropriation of water. The court cited to *Howard v. Perrin*, saying:

> "[A]nd therein we held that waters percolating generally through the soil are the property of the owner***.
>
> ***Whether such statement was, strictly speaking, *dicta* or not, it has been accepted as the law of this jurisdiction for so long, and so many rights have been based on it, that only the clearest showing that the rule declared was error would justify us in departing from it." *Id.* at 82-83, 4 P.2d at 375-76.

The Town of Chino Valley relies on the two foregoing cited cases, but there are others in which the statement first made in *Howard v. Perrin* was repeated, although there was at no time, according to the way we read the cases, an arguable issue as to the precise nature of the right which the owner of the overlying lands had to the waters beneath. See *Fourzan v. Curtis*, 43 Ariz. 140, 147, 29 P.2d 722, 725 (1934); *Gross v. MacCornack*, 75 Ariz. 243, 248, 255 P.2d 183, 186 (1953); *State v. Anway*, 87 Ariz. 206, 208, 349, P.2d 774, 775 (1960).

Dictum thrice repeated is still dictum. It is a court's statement on a question not necessarily involved in the case and, hence, is without force of adjudication. *Garvey v. Trew*, 65 Ariz. 342, 350, 170 P.2d 845, 850 (1946). It is not controlling as precedent. *Knight v. State*, 273 Ala. 480, 486, 142 So.2d 899, 905 (1962); *Sharkiewicz v. Smith*, 142 Conn. 410, 412, 114 A.2d 691, 692 (1955). We therefore hold that the statement first made in *Howard v. Perrin* and reiterated under circumstances where the exact nature of the overlying owner's rights to the water beneath his property were not in question is not precedent for the decision in this case.

In 1952, in *Bristor v. Cheatham,* 73 Ariz. 228, 240 P.2d 185, a majority of this Court held that waters percolating beneath the surface of the land were subject to appropriation. On rehearing, however, one new judge having been elected and one judge having changed his position, it was held that groundwater was not subject to appropriation. The majority said:

> "[M]any and large investments have been made in the development of ground waters. Under these circumstances the court's announcement of the rule becomes a rule of property***." 75 Ariz. 227, 231, 255 P.2d 173, 175 (1953).

In 1970, in *Jarvis v. State Land Development,* 106 Ariz. 506, 479 P.2d 169, we said:

> "The right to exhaust the common supply by transporting water for use off the lands from which they are pumped is a rule of law controlled by the doctrine of reasonable use and protected by the constitution of the state as a right in property." 106 Ariz. at 509-10, 479 P.2d at 172-73.

The statements in *Bristor* and *Jarvis* do not mean that rights to the use of groundwaters cannot be modified prospectively by the Legislature. They only mean that courts will adhere to an announced rule to protect rights acquired under it and that if any change in the law is necessary, it should be made by the Legislature. *Stewart v. Stewart,* 199 Cal. 318, 341, 249 P. 197-207 (1926); *Madfes v. Beverly Development Corp.,* 251 N.Y. 12, 18, 166 N.E. 787, 789 (1929). The doctrine of rule of property has no operation as against subsequent legislation. *Bryan v. W. T. Smith Lumber Co.,* 278 Ala. 538, 543, 179 So.2d 287, 292 (1965); *St. Martin Land Co. v. Pickney,* 212 La. 605 618, 33 So.2d 169, 173 (1947); *Nice Ball Bearing Co. v. Mortgage Building & Loan Association,* 310 Pa. 560, 566, 166 A. 239, 241 (1933).

We therefore hold that since the Act of 1980 is prospective in application, it is not a legislative encroachment on

judicial powers.

Appellants urge that the 1980 Act denies them due process of law and just compensation. The question therefore is, what are a landowner's rights in the water percolating under his lands?

In our recent case of *Town of Chino Valley v. State Land Dept.*, 119 Ariz. 243, 580 P.2d 704 (1978), we said:

> "Under the doctrine of reasonable use property owners have the right to capture and use the underground water beneath their land for a beneficial purpose on that land***." *Id.* at 248, 580 P.2d at 709.

This statement we think is supported by the by the better reasoned decisions in this country. In the absolute sense, there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control by the person claiming them because of their migratory character. Like wild animals free to roam as they please, they are the property of no one.

In *Knight v. Grimes*, 127 N.W.2d 708, 711 (S.D. 1964), the court noted that South Dakota is largely a semi-arid state and that the legislature was fully justified in finding the public welfare required the maximum protection and utilization of its water supply. It said:

> "The notion that this right to take and use percolating water constitutes an actual ownership of the water prior to withdrawal has been demonstrated to be legally fallacious. *Bassett v. Salisbury Mfg. Co.*, 1862, 43 N.H. 569, 82 Am.Dec. 179; *Katz v. Walkingshaw*, 1902, 141 Cal. 116, 70 P. 663, 64 L.R.A. 236; *Ohio Oil Company v. Indiana*, 1900, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729."

In the recent case of *Vilage of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663, 666-67 (Fla.), *cert. denied*, 444 U.S. 965, ___ S. CT. ___ (1979), it was held:

> "Ancient law gave no special consideration to ground water, treating all water like the air, the sea,

and wild animals, as the property of no one or the property of everyone. Trelease, *Government Ownership and Trusteeship of Water,* 45 Calif. Law Review, 638, 640 (1957).

* * * * *

The common-law concept of absolute ownership of percolating water while it is in one's land gave him the right to abstract from his land all the water he could find there. On the other hand, it afforded him no protection against the acts of his neighbors who, by pumping on their own land, managed to draw out of his land all the water it contained. Thus the term 'ownership' as applied to percolating water never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself.

> The right of the owner to ground water underlying his land is to the usufruct of the water and not to the water itself."

We therefore hold that there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water.

This brings us to conclude that appellants' position that the 1980 Act violates the Fifth and Fourteenth Amendments to the Constitution of the United States and art. 2, § 17 of the Constitution of the State of Arizona as a taking of private property without due process of law and just compensation cannot be sustained.

The Legislature, in Ch. 2 of the 1980 Act, A.R.S. § 45-401, declared:

> "A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly

in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state."

We do not doubt but that the overdraft of groundwater in this state is a serious problem which has no chance of correcting itself, and that it is necessary for comprehensive legislation to both limit groundwater use and allocate its use among competing interests.

More than twenty-five years ago, this court decided that the Legislature might choose between competing interests where the supply of groundwater was limited. In *Southwest Engineering Co. v. Ernst,* 79 Ariz. 403, 291 P.2d 764 (1955), we said in holding constitutional the groundwater act of 1948:

"The legislative finding that the exhaustion of ground water by excessive withdrawals threatens to destroy one of the principal economic resources of the state to the consequential serious injury of all is not disputed. Such a conclusion is obviously justified because unrestrained use must inevitably result either in complete exhaustion of the state's ground water so

that in the end the lands dependent thereon will revert to their desert state or in the lowering of water tables so that the increased cost of pumping will reduce these lands to a marginal or submarginal condition." *Id.* at 408-09, 291 P.2d at 768 (footnote omitted).

We held that there was a preponderant public interest in the preservation of lands then in cultivation as against lands potentially reclaimable "and that where as here the choice is unavoidable because a supply of water is not available for both, we cannot say that the exercise of such choice, controlled by considerations of social policy which are not unreasonable, involves a denial of due process." *Id.* at 410, 291 P.2d at 769. The Legislature in the Act of 1980 again recognized that the supply of groundwater is limited and again exercised a choice for the preservation and use of groundwater.

Legislation which denies or restricts rights to use property necessarily results in a diminution of that property's value. Yet the United States Supreme Court has on numerous occasions upheld under the state's police power regulations of land use which have virtually destroyed private interests. Most recently, in *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), it was held that a zoning ordinance restricting the use of a five-acre tract of land to single family residences would not effect a taking of property without compensation. The city ordinance was found to further the legitimate state interest of protecting the residents of the city from the ill effects of urbanization. *Id* at ___, 100 S.Ct. at 2142, 65 L.Ed. at ___. In the present case, appellants may make such use of their property as they choose, except that their lands may not be irrigated if they were not legally irrigated in the last five years. The 1980 Act furthers legitimate state interests.

Legislatures of various states have from time to time abolished the prevailing uses of groundwater and substituted other plans for its use. State courts have uniformly rejected the idea that groundwater percolating through the

soil may not be limited and regulated and must be acquired by eminent domain. *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663 (Fla.), *cert. denied*, 444 U.S. 965, ___ S.Ct. ___ (1979); *Williams v. Wichita*, 190 Kan. 317, 340-41, 374 P.2d 578, 595-96 (1962), *cert. denied*, 375 U.S. 7, 84 S.Ct. 46, 11 L.Ed.2d 38 (1963); *Crookston Cattle Co. v. Minnesota Department of Natural Resources*, 300 N.W.2d 769, 774 (Minn. 1980); *Baeth v. Hoisveen*, 157 N.W.2d 728, 733 (N.D. 1968); *Knight v. Grimes*, 80 S.D. 517, 523-27, 127 N.W.2d 708, 711-14 (1964).

> "Like zoning legislation, legislation which limits or regulates the right to use underlying water is permissible. * * * Where regulation operates to arbitrate between competing public and private land uses, however, as does the water priority statute in this case, such legislation is upheld even where the value of the property declines significantly as a result." *Crookston Cattle Co. v. Minnesota Department of Natural Resources*, 300 N.W.2d at 774 (citation omitted).

We hold that the Act of 1980 does not deny appellants due proocess of law and does not require that they be paid compensation for any possible diminution of their rights which they may have had under the doctrine of reasonable use.

Appellants argue that the 1980 Act is unconstitutional because it contains provisions not included in its title, which is forbidden by art. 4, part 2, § 13 of the Arizona Constitution. In the Session Laws of 1980, the title of the 1980 Act consists of approximately two and one-half printed pages. We have said:

> "[I]t is not necessary that the title be a synopsis or a complete index of the legislation that is to follow; that a title is invulnerable when it is sufficiently full and comprehensive as to indicate, in a general way at least, what is to follow in the way of legislation; that it should not be so meagre as to mislead or tend to avert

> inquiry as to the context thereof, and it is sufficient if the provisions of the Act relate directly or indirectly to the subject expressed in the title and have a natural connection therewith and not foreign thereto; and '* * * "the title is sufficient if it is not productive of surprise and fraud, and is not calculated to mislead the legislature or the people, but is of such character as fairly to apprise legislators, and the public in general, of the subject matter of the legislation, and of the interests that are or may be affected thereby, *and to put anyone having an interest in the subject matter on inquiry.*" '" *Dennis v. Jordan,* 71 Ariz. 430, 439, 229 P.2d 692, 697-98 (1951) (emphasis in original).

The title of the 1980 Act in part provides:

> "An Act relating to waters; providing for the management of groundwater; * * * prescribing conditions on the withdrawal and use of groundwater in active management areas and irrigation non-expansion areas; * * * prescribing the determination of rights to withdraw and use groundwater; prescribing the use, nature of and conditions and limitations on groundwater rights; * * * prescribing rights of cities, towns, private water companies and others to withdraw and supply groundwater * * *." Groundwater Management Act, 1980 Ariz. Sess. Laws 4th Spec. Sess. 1339.

A cursory examination of the title fairly apprises the reader of the subject matter of the legislation and the interests which are or may be affeccted. It puts the reader on notice that the groundwater rights of all persons and entities in the State will be significantly affected by the Act and puts anyone interested in the subject matter on inquiry. More than this is not required. We hold that the 1980 Act does not contain provisions which are not reasonably related to or included in its title.

Many and varied interests are affected by the 1980 Act. These interests are apparent in the briefs which amici

curiae have filed. We express our appreciation for their excellence and the assistance which they have given the Court. Some matters have been raised and argued which were not addressed by the parties. As to these, it is the rule that amici curiae are not permitted to create, extend, or enlarge issues beyond those raised and argued by the parties. *City of Tempe v. Prudential Insurance Company of America*, 109 Ariz. 429, 510 P.2d 745 (1973). And see the second *Bristor* opinion, 75 Ariz. 227, 230, 255 P.2d 173, 175 (1953), where the court commented:

> "It was never alleged in the complaint nor contended by the plaintiffs in assignment of error or briefs that they had appropriated percolating water. This issue was apparently introduced into the case by amici curiae who have no right to create, extend or enlarge the issues."

This Court will only decide issues raised and argued by the parties.

The order of the court below is affirmed.

FRED C. STRUCKMEYER, JR.
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN, Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

BEN C. BIRDSALL, Judge
Court of Appeals, Division Two

Note: Justice Frank X. Gordon, Jr. having announced his disqualification from any participation in this matter, The Honorable Ben C. Birdsall, Judge, Court of Appeals, Division Two was asked to sit in his stead.

*

The 1980 Act provided for the establishment of Active Management Areas which are geographical areas where groundwater supplies are imperiled. A.R.S. §§ 45-411 to -637. Active Management Areas encompass a whole groundwater basin or basins. A.R.S. § 45-412(B). Groundwater basins are areas designated as enclosing a relatively hydrologically distinct body or related bodies of groundwater. A.R.S. § 45-402(10). Groundwater sub-basins are areas designated so to enclose a smaller hydrologically distinct body of groundwater found within a groundwater basin. A.R.S. § 45-402(25).

The 1980 Act provides limitations on use of groundwater in Active Management Areas. In general the Act restricts new uses of water drawn from Active Management Areas. The Act sets up a system of determining grandfathered rights to use groundwater in Active Management Areas, A.R.S. §§ 45-461 to -482, defining certain usages of groundwater previously being made and allowing these usages to continue. A.R.S. § 45-462. The Act also establishes the rights of cities, towns, private water companies and irrigation districts in Active Management Areas to withdraw as much groundwater as is needed from within their service areas to serve their customers although restrictions are provided on extensions of service areas and the types of service that may be provided by these entities. A.R.S. § 45-491. The Act also specifies a few other new uses of groundwater that may be made in Active Management Areas. It allows limited new withdrawals for domestic purposes. A.R.S. § 45-454. It also sets up a system for obtaining permits to withdraw new amounts of water for certain specific purposes. A.R.S. §§ 45-511 to -528.

Provided withdrawal is permitted under any of the provisions of the Act, transportation of groundwater within the same sub-basin may be made without payment of damages. A.R.S. § 45-451. Transportation of groundwater between sub-basins or away from Active Management Areas is also authorized if the groundwater is allowed to be withdrawn under the Act's provisions, but damages must be paid for any injury caused. A.R.S. §§ 45-542, -543. Rules for determining damage are set out in A.R.S. § 45-545. The transportation rules apply whether in or outside of Active Management Areas, A.R.S. § 45-544, although the restrictions on new uses of groundwater do not apply outside of Active Management Areas. A.R.S. § 45-453.

The Act provides for conservation for all uses of groundwater in Active Management Areas. A.R.S. §§ 45-561 to -579. The Act ends with provisions governing the drilling and registering of wells for withdrawing groundwater, A.R.S. §§ 45-591 to -604, and financial and enforcement provisions to carry out the legislation, A.R.S. §§ 45-611 to -615, -631 to -637.

* * * * *

ARTICLE 1. ADMINISTRATION

§ 45-401. Declaration of policy

A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

§ 45-402. Definitions.

In this chapter, unless the context otherwise requires:

1. "Accounting period" means the calendar year, except such other twelve-month period as may be otherwise agreed upon by the director and the owner of a farm or a district on behalf of its landowners.

2. "Active management area" means a geographical area which has been designated pursuant to article 2 of this chapter as requiring active management of groundwater.

3. "Animal industry use" means the production, growing and feeding of livestock, range livestock or poul-

try, as such terms are defined in § 24-101. Animal industry use is included in the term and general treatment of industry in this chapter, unless specifically provided otherwise.

4. "City" or "town" means a city or town incorporated or chartered under the constitution and laws of this state.

5. "Convey" means to transfer the ownership of a grandfathered right from one person to another.

6. "Effluent" means water which, after being withdrawn as groundwater or diverted as surface water, has been used for domestic, municipal or industrial purposes and which is available for reuse for any purpose, whether or not the water has been treated to improve its quality.

7. "Exempt well" means a well having a pump with a maximum capacity of not more than thirty-five gallons per minute which is used to withdraw groundwater for domestic purposes, including the non-commercial irrigation of not more than one acre of land.

8. "Expanded animal industry use" means increased water use by an animal industrial enterprise on the land in use by the enterprise on June 12, 1980 or on immediately adjoining land, excluding irrigation uses.

9. "Farm" means an area of irrigated land under the same ownership which is served by a water distribution system common to the irrigated land and to which can be applied common conservation, water measurement and water accounting procedures.

10. "Farm unit" means one or more farms irrigated with groundwater which are contiguous or in proximity to each other with similar soil conditions, crops and cropping patterns.

11. "Grandfathered right" means a right to withdraw and use groundwater pursuant to article 5 of this chapter based on the fact of lawful withdrawals and use of groundwater prior to the date of the designation of an active management area.

12. "Groundwater basin" means an area which, as nearly as known facts permit as determined by the director pursuant to this chapter, may be designated so as to enclose a relatively hydrologically distinct body or related bodies of groundwater, which shall be described horizontally by surface description.

13. "Initial active management area" means the Tucson, Phoenix, Prescott or Pinal active management area established by § 45-411.

14. "Irrigate" means to apply water to two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in § 24-101.

15. "Irrigation acre" means an acre of land, as determined in § 45-465, subsection B, to which an irrigation grandfathered right is appurtenant.

16. "Irrigation district" means a political subdivision, however designated, established pursuant to chapter 4 or 6 of this title.

17. "Irrigation grandfathered right" means a grandfathered right determined pursuant to § 45-465.

18. "Irrigation non-expansion area" means a geographical area which has been designated pursuant to article 3 of this chapter as having insufficient groundwater to provide a reasonably safe supply for the irrigation of the cultivated lands at the current rate of withdrawal.

19. "Irrigation use" means the use of groundwater on two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in § 24-101.

20. "Irrigation water duty" or "water duty" means the amount of water in acre-feet per acre that is reasonable to apply to irrigated land in a farm unit during the accounting period, as determined by the director pursuant to §§ 45-564

through 45-568.

21. "Non-irrigation grandfathered right" means a grandfathered right determined pursuant to § 45-463, 45-464, 45-469 or 45-472.

22. "Non-irrigation use" means a use of groundwater other than an irrigation use.

23. "Person" means an individual, public or private corporation, company, partnership, firm, association, society, estate, trust, any other private organization or enterprise, the United States, any state, territory or country or a governmental entity, political subdivison or municipal corporation organized under or subject to the constitution and laws of this state.

24. "Private water company" means any entity which distributes or sells groundwater, except a political subdivision or an entity established pursuant to this title which is not regulated as a public service corporation by the Arizona corporation commission under a certificate of public convenience and necessity. A city or town is not a private water company.

25. "Service area" means:

(a) With respect to a city or town, the area of land actually being served water by the city or town plus:

(i) Additions to such area which contain an operating distribution system owned by the city or town primarily for the delivery of non-irrigation water.

(ii) The service area of a city, town or private water company that obtains its water from the city pursuant to a contract entered into prior to the date of the designation of the active management area.

(b) With respect to a private water company, the area of land of the private water company actually being served water by the private water company plus additions to such area which contain an operating distribution system owned by the private water company primarily for the delivery of

non-irrigation water.

26. "Service area of an irrigation district" means:

(a) With respect to an irrigation district which was engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area, the area of land within the boundaries of the irrigation district actually being served water by the irrigation district at any time during the five years preceeding the date of the designation of the active management area plus any areas as of the date of the designation of the active management area within the boundaries of the irrigation district which contain an operating system of canals, flumes, ditches and other works owned or operated by the irrigation district. The service area may be modified pursuant to § 45-494.01.

(b) With respect to an irrigation district which was not engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area:

(i) The acres of member lands within the boundaries of the irrigation district which were legally irrigated at any time from January 1, 1975 through January 1, 1980 for initial active management area or during the five years preceding the date of the designation of the active management area for subsequent active management areas.

(ii) Any areas as of the date of the designation of the active management area within the boundaries of the irrigation district which contain an operating system of canals, flumes, ditches and other works for the withdrawal, delivery and distribution of water.

27. "Sub-basin" means an area which, as nearly as known facts permit as determined by the director pursuant to this chapter, may be designated so as to enclose a relatively hydrologically distinct body of groundwater within a groundwater basin, which shall be described horizontally by surface description.

28. "Subsequent active management area" means an active management area established after June 12, 1980 pursuant to article 2 of this chapter.

29. "Subsidence" means the settling or lowering of the surface of land which results from the withdrawal of groundwater.

30. "Transportation" means the movement of groundwater from the point of withdrawal to the point of use.

31. "Type 1 non-irrigation grandfathered right" means a non-irrigation grandfathered right associated with retired irrigated land and determined pursuant to § 45-463, 45-469 or 45-472.

33. "Type 2 non-irrigation grandfathered right" means a non-irrigation grandfathered right not associated with retired irrigated land and determined pursuant to § 45-464.

33. "Well" means a man-made opening in the earth through which water may be withdrawn or obtained from beneath the surface of the earth.

§ 45-403. Designation of groundwater basins and sub-basins; hearing

A. Within eighteen months of the effective date of this section[1], the director shall propose boundaries for all groundwater basins and sub-basins of groundwater basins in this state not included within initial active management areas established pursuant to § 45-411.

B. Within twenty-four months of the effective date of this section[1], the director shall hold public hearings to consider the final boundaries of groundwater basins and sub-basins in this state not included within initial active management areas established pursuant to § 45-411. The director shall give reasonable notice of the hearing appropriate to the circumstances which shall include the publication once each week for two consecutive weeks in a newspaper of general circulation in each county in which the proposed ground-

[1] June 12, 1980.

water basin is located. Any notice shall contain the time and place of the hearing, the legal description and a map clearly identifying and describing all lands to be included in the proposed groundwater basin and any sub-basin and any other information the director deems necessary.

C. The hearings shall be held at the county seat of the county in which the major portion of the land in the proposed groundwater basin is located as soon as practicable but no less than thirty days and no more than sixty days after the first publication of the notice of the hearing. At the hearing, the director shall present the factual data in his possession in support of the proposed action. Any person may appear at the hearing, either in person or by representative, and submit oral or documentary evidence for or against the proposed action. In making his determination, the director shall give full consideration to public comment and to recommendations made by local political subdivisions.

§ 45-404. Findings upon hearing; maps; order for boundaries of groundwater basin; review and modification of boundaries

A. Within sixty days after the hearing, the director shall make and file in his office written findings with respect to matters considered during the hearing. For each groundwater basin, the director shall prepare and file in his office:

1. A map clearly identifying all lands included within the groundwater basin and its sub-basins.

2. Factual data justifying the boundaries of the groundwater basin and sub-basins.

3. An order designating the boundaries of each groundwater basin and its sub-basins.

B. The findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing and the order is effective when published for the final time. The materials required by subsection A of this section and a transcript of

of the hearing are public records of the department and shall be available for examination by the public during regular business hours.

C. The director shall file a true copy of the map in the office of the county recorder of the county or counties in which the groundwater basin is located.

D. The director may, as conditions require and factual data justify, review and modify the boundaries of any groundwater basin or any sub-basin of a groundwater basin except for groundwater basins and sub-basins of a groundwater basin that are included within an initial active management area. The review and modification of boundaries of a groundwater basin or sub-basin included within a subsequent active management area or irrigation non-expansion area shall follow procedures set forth in §§ 45-417 and 45-438. Any modification of boundaries designated pursuant to this article shall follow as closely as practicable the procedural requirements § 45-403 and this section.

§ 45-405. Rehearing; appeals from decisions of the director; assignment of appeals

A. The director shall, by regulation, provide an opportunity for rehearing or review of any decision of the director.

B. Except as otherwise provided in this chapter, appeals from a decision of the director shall be conducted pursuant to title 12, chapter 7, article 6[1] and shall extend to all questions of law and fact presented by the record.

C. A hearing held by the director or hearing officer shall be stenographically reported. If the person appeals a decision of the director or hearing officer, a transcript shall be made.

D. If no hearing was held, the court shall remand to the director for purposes of conducting a hearing, unless the

[1] Section 12-901 et seq.

party appealing waives such remand and consents that the matter be decided by the court on the record before it.

E. No new or additional evidence in support of or in opposition to a finding, order, determination or decision of the director shall be heard by the court except if, in the discretion of the court, justice demands the admission of such evidence.

F. Each appeal under this section shall be assigned to a judge whom the chief justice of the supreme court has specifically designated, pursuant to § 45-406, to hear appeals under this section.

§ 45-406. Designation of judges; publication of designated judges

A. The chief justice of the supreme court, within sixty days after the effective date of this section,[1] shall designate at least one judge, but not more than five judges, of the superior court to hear appeals perfected under § 45-405. The chief justice of the supreme court shall also specify the particular county or counties for which each designated judge will be available for assignment.

B. The supreme court shall publish in the rules of the supreme court the name of each designated judge and the county or counties in which each designated judge will be available for assignment.

C. The presiding judge for the county in which an appeal has been perfected under § 45-405 shall assign the appeal to the appropriate judge designated by the chief justice of the supreme court and shall advise in writing the presiding judge and clerk of the superior court in the county in which the designated judge ordinarily sits about the assignment.

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[1] June 12, 1980.

§ 45-407. Stay of director's decision; precedence of appeals; review by the court of appeals

A. The decision of the director shall not be stayed pending appeal, except that the judge to whom the appeal has been assigned may stay the decision of the director with or without bond upon a showing of good cause. In determining whether good cause exists under the circumstances, the court may consider:

1. The public interest will not be adversely affected by a stay.

2. The stay will not harm others.

3. There is a high probability that the appellant will succeed on the merits.

4. The appellant will suffer irreparable harm before a decision on the merits can be rendered.

B. For the benefit of the people of this state, appeals perfected under § 45-405 have precedence, in every court, over all other civil proceedings.

C. The final decision of the superior court is appealable in the same manner as in civil actions generally and shall be governed by the rules of appellate procedure.

ARTICLE 2. ACTIVE MANAGEMENT AREAS

§ 45-411. Initial active management areas; maps

A. Four initial active management areas are established on the effective date of this section.[1] The four initial active management areas are:

1. The Tucson active management area which includes the upper Santa Cruz and Avra valley sub-basins.

2. The Phoenix active management area which includes the east Salt river valley, west Salt river valley, Fountain hills, Carefree, lake Pleasant, Rainbow valley and Hassayampa sub-basins.

3. The Prescott active management area which includes the little Chino and upper Agua Fria sub-basins.

4. The Pinal active management area which includes the Maricopa-Stanfield, Eloy, Aguirre valley, Santa Rosa valley and Vekol valley sub-basins.

B. The boundaries of the initial active management areas are shown on the maps filed in the office of the secretary of state on the effective date of this chapter.[1]

C. A true copy of the maps identifying the initial active management areas shall be on file in the department and shall be available for examination by the public during regular business hours. A true copy of the map of each initial active management area shall also be filed in the office of the county recorder of the county or counties in which the active management area is located.

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[1] June 12, 1980.

§ 45-412. Subsequent active management areas; criteria; review of groundwater basins not subject to active management

A. The director may designate an area which is not included within an initial active management area, pursuant to § 45-411, as a subsequent active management area if the director determines that any of the following exists:

1. Active management practices are necessary to preserve the existing supply of groundwater for future needs.

2. Land subsidence or fissuring is endangering property or potential groundwater storage capacity.

3. Use of groundwater is resulting in actual or threatened water quality degradation.

B. An active management area designated pursuant to this section may include more than one groundwater basin but shall not be smaller than a groundwater basin or include

only a portion of a groundwater basin, except for the regional aquifer systems of northern Arizona.

C. The director shall periodically review all areas which are not included within an active management area to determine whether such areas meet any of the criteria for active management areas as prescribed in this section.

§ 45-413. Hearing on designation of subsequent active management areas and boundaries; notice; procedures

A. If the director proposes to designate a subsequent active management area pursuant to § 45-412, subsection A, the director shall hold a public hearing to consider:

1. Whether to issue an order declaring the area an active management area.

2. The boundaries and any sub-basins of the proposed active management area.

B. The director shall give reasonable notice of the hearing under the circumstances which shall include publication once each week for two consecutive weeks in a newspaper of general circulation in each county in which the proposed active management area is located. Any notice shall contain the time and place of the hearing, the legal description and a map clearly identifying and describing all lands to be included in the proposed active management area and any sub-basins and any other information the director deems necessary.

C. The hearing shall be held at a location within the proposed active management area as soon as practicable but no less than thirty days and no more than sixty days after the first publication of the notice of hearing. At the hearing, the director shall present the factual data in his possession in support of the proposed action. Any person may appear at the hearing, either in person or by representative, and submit oral or documentary evidence for or against the proposed action. In making his determination, the director shall give full consideration to public comment and to

recommendations made by local political subdivisions.

§ 45-414. Findings upon hearing; order for active management area; publication

A. Within thirty days after the hearing, the director shall make and file in his office written findings with respect to matters considered during the hearing. If the director decides to declare an area an active management area, the director shall make and file an order designating the active management area.

B. The findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing, and the order is effective when published for the final time. All factual data compiled by the director, a transcript of the hearing, a copy of the findings and a map identifying the lands included in the active management area are public records of the department and shall be available for examination by the public during regular business hours.

C. The director shall file a true copy of the map in the office of the county recorder of the county or counties in which the active management area is located.

§ 45-415. Local initiation for active management area; procedures

A. A groundwater basin which is not included within an initial active management area may be designated an active management area upon petition by ten percent of the registered voters residing within the boundaries of the proposed active management area, as of the most recent report compiled by the county recorder in compliance with § 16-168, subsection G, and a subsequent election held pursuant to the general election laws of this state. The form of the petition shall be the same as for initiative petitions, and the applicant for such petition shall comply with the provisions of § 19-111.

B. Upon application for a petition number with the clerk of the board of supervisors or county election officer, the director shall transmit a map of the groundwater basin to the county recorder of each county in which the proposed active management area is located. The map shall be on a scale adequate to show with substantial accuracy where the boundaries of the groundwater basin cross the boundaries of county voting precincts. The director shall also transmit to the county recorder all other factual data concerning the boundaries of the groundwater basin that may aid the county recorder in the determination of which registered voters of the county are residents of the groundwater basin.

C. Any registered voter of a county whose residency in the groundwater basin is in question shall be allowed to vote. The ballot shall be placed in a separate envelope, the outside of which shall contain the precinct name and number, the signature of the voter, the residence address of the voter, and the voter registration number of the voter, if available. The voter receipt card shall be attached to the envelope. The county recorder shall verify the ballot for proper residency of the voter before counting. Such verification shall be made within two days following the election, and the voter receipt card shall be returned to the voter. Verified ballots shall be counted using the procedure outlined for counting absentee ballots. If residency in the groundwater basin is not verified, the ballot shall remain unopened and shall be destroyed.

D. Except as provided in subsection E of this section, all election expenses incurred pursuant to this section are the responsibility of the county involved.

E. If a groundwater basin is located in two or more counties, the following procedures apply:

1. The petition shall be filed with the clerk of the board of supervisors or county election officer of the county in which the plurality of the registered voters in the groundwater basin resides.

2. The number of registered voters required to sign the petition shall be ten per cent of the registered voters residing within the boundaries of the proposed active management area, as of the most recent report compiled by the county recorder in compliance with § 16-168, subsection G, within the county in which the plurality of the registered voters in the groundwater basin resides.

3. The election shall be called by the board of supervisors of the county in which the petition is filed, and the board shall immediately notify the board of supervisors of any other county included in the groundwater basin of the date of the election. The election shall be held not less than sixty days or more than ninety days from the date of call. The board of supervisors so notified shall then call the election in their county for the same date and follow the procedures for conducting the general elections in this state.

4. All election expenses incured pursuant to this subsection are the responsibilities of the counties involved on a proportional basis considering the number of registered voters of each county that are residents of the groundwater basin.

F. The ballot shall be worded, "should the (insert name of basin) groundwater basin be designated an active management area?" Followed by the words "yes" and "no". Opposite each such word there shall be a square in which the voter may make a cross indicating his preference.

§ 45-416. Limitation on number of irrigated acres

A. If the director initiates the procedure for designating a subsequent active management area or the board of supervisors calls an election to establish an active management area, an irrigation user may not increase the number of his irrigated acres within the proposed active management area in excess of the highest number of acres he has irrigated within the proposed active management area at one time in one year in the five years preceding the initiation of desig-

nation procedures by the director or the call for the election by the board of supervisors.

B. The limitation on the number of irrigated acres shall continue in effect until the director makes a final determination pursuant to § 45-414 or the final results of an election to establish an active management area pursuant to § 45-415 are certified by the board of supervisors of the county or counties in which the proposed subsequent active management area is located.

§ 45-417. Review and modification boundaries of subsequent active management area

A. The director may review and modify the boundaries of a subsequent active management area or any of its sub-basins as conditions require and factual data justify.

B. The director shall review the boundries of a subsequent active management area or any of its sub-basins upon receipt of a petition signed by persons who together withdraw not less than one-fourth of the groundwater withdrawn in the active management area or by request of the groundwater users advisory council in the active management area.

C. Before modifying the boundaries of a subsequent active management area or any of its sub-basins the director shall give notice of and hold a hearing on the proposed modifications pursuant to the procedures prescribed by § 45-413. After the hearing, the director shall prepare written findings pursuant to § 45-414.

§ 45-418. Area director; appointment; term; qualifications; compensation

A. The director shall appoint an area director for each active management area. For reasons of economy and efficiency in administration, one person may be the area director for more than one active management area. The area director shall serve at the pleasure of the director.

B. The area director is exempt from the state personnel system and is entitled to received compensation as determined pursuant to § 38-611.

§ 45-419. Duties of area director

The area director shall:

1. Assist the director in the development of the management plan for the active management area and implement the plan under the director's supervision.

2. Have such other duties as the director may assign and shall be responsible to the director for the performance of such duties.

3. Furnish technical and clerical services and such other assistance to the groundwater users advisory council as is required, to the extent funds are made available for such assistance.

§ 45-420. Groundwater users advisory councils; appointment; representation of water users; term; compensation

A. There shall be a groundwater users advisory council in each active management area consisting of five members. Members of the council shall be appointed by the governor to represent the users of groundwater in the active management area and on the basis of their knowledge of, interest in and experience with problems relating to the development, use and conservation of water.

B. Members of the council shall serve without compensation, except that each member shall be reimbursed for travel and subsistence while engaged in business of the council in the same manner as is provided by law for state officers.

§ 45-421. Administrative duties of the groundwater users advisory councils.

The groundwater users advisory ccouncil shall:

1. Advise the area director for the active management

area, make recommendations on groundwater management programs and policies for the active management area and comment on proposed management plans for the active management area before they are adopted by the director.

2. Keep the minutes of its meetings and all records, reports and other information relative to its work and programs in permanent form indexed and systematically filed.

3. Elect from its members a chairman and vice-chairman for terms of two years expiring on the third Monday of January of each even numbered year.

4. Designate the person or persons who shall execute all documents and instruments on behalf of the council.

5. Manifest and record its actions by motion, resolution or other appropriate means.

6. Make a complete record of its proceedings which shall be open to public inspection during regular business hours in the branch office of the department in the active management area.

ARTICLE 3. IRRIGATION NON-EXPANSION AREAS

§ 45-431. Initial irrigation non-expansion areas

The Douglas critical groundwater area and the Joseph city critical groundwater area, delineated in the orders of the state land commissioner dated May 5, 1965 and December 16, 1974, respectively, are designated as initial irrigation non-expansion areas on the effective date of this chapter and are governed by the provisions of this article.

§ 45-432. Subsequent irrigation non-expansion areas; designation; review

A. The director may designate an area which is not included within an active management area as a subsequent irrigation non-expansion area if the director determines that both of the following apply:

1. There is insufficient groundwater to provide a reasonably safe supply for irrigation of the cultivated lands in the area at the current rates of withdrawal.

2. The establishment of an active management area pursuant to § 45-412 is not necessary.

B. An irrigation non-expansion area established pursuant to this section may include more than one groundwater sub-basin but shall not be smaller than a groundwater sub-basin or include only a portion of a groundwater sub-basin.

§ 45-433. Local initiation for designation; procedures

A. The designation of a subsequent irrigation non-expansion area may be initiated by the director or by petition to the director signed by either:

1. Not less than twenty-five irrigation users of groundwater, or one-fourth of the irrigation users of groundwater within the boundaries of the groundwater basin or sub-basin specified in the petition.

2. Ten per cent of the registered voters residing within the boundaries of the groundwater basin or sub-basin specified in the petition as of the most recent report compiled by the county recorder in compliance with § 16-168, subsection G. The form of the petition shall be the same as for an initiative petition and the applicant for such petition shall comply with the provisions of § 19-111. If a groundwater basin or sub-basin is located in two or more counties, the number of registered voters residing within the boundaries of the groundwater basin or sub-basin, as of the most recent report compiled by the county recorder in compliance with § 16-168, subsection G, within the county in which the plurality of the registered voters in the groundwater basin or sub-basin resides.

B. Upon receipt of a petition pursuant to subsection A, paragraph 2 of this section, the director shall transmit the petition to the county recorder of each county in which the

groundwater basin or sub-basin is located for verification of signatures. In addition, the director shall transmit a map of the groundwater basin or sub-basin to the county recorder of each such county included. The map shall be on a scale adequate to show with substantial accuracy where the boundaries of the groundwater basin or sub-basin cross the boundaries of county voting precincts. The director shall also transmit to the county recorder all other factual data concerning the boundaries of the groundwater basin or sub-basin that may aid the county recorder in the determination of which registered voters of the county are residents of the groundwater basin or sub-basin.

§ 45-434. Limitation on number of irrigated acres

A. If procedures are initiated, whether by the director or by petition, for designating an irrigation non-expansion area, an irrigation user may not increase the number of his irrigated acres within the proposed irrigation non-expansion area in excess of the highest number of acres he has irrigated within the proposed irrigation non-expansion area at one time in one year in the five years preceding the notice of the initiation of designation procedures by the director or the filing of the petition by the registered voters.

B. The limitation on the number of irrigated acres shall continue in effect until the director makes a final determination pursuant to § 45-436.

§ 45-435. Hearing on designation of subsequent irrigation non-expansion areas and boundaries; notice; procedures

A. If the director finds that an area which is not included within an active management area meets the criteria specified in § 45-432, or a petition is filed pursuant to § 45-433, the director shall hold a public hearing to consider:

1. Whether to issue an order declaring the area an irrigation non-expansion area.

2. The boundaries of the proposed irrigation non-expansion area.

B. The director shall give reasonable notice of the hearing under the circumstances which shall include the publication once each week for two consecutive weeks in a newspaper of general circulation in each county in which the proposed irrigation non-expansion area is located. Any notice shall contain the time and place of the hearing, the legal description and a map clearly identifying and describing all lands to be included in the proposed irrigation non-expansion area and any other information the director deems necessary.

C. The hearing shall be held at a location in the county in which the major portion of the proposed irrigation non-expansion area is located no less than thirty days but no more than sixty days after the first publication of the notice of the hearing. At the hearing, the director shall present the factual data in his possession in support of or in opposition to the proposed action. Any person may appear at the hearing, either in person or by representative, and submit oral or documentary evidence for or against the proposed action. In making his determination, the director shall give full consideration to public comment and to recommendations made by local political subdivisions.

§ 45-436. Findings upon hearing; order for irrigation non-expansion area; publication

A. Within thirty days after the hearing, the director shall make and file in his office written findings with respect to matters considered during the hearing. If the director decides to declare an area an irrigation non-expansion area, the director shall make and file an order designating the irrigation non-expansion area.

B. The findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing, and the order effective when published for the final time. All factual data compiled by the director, a transcript of the hearing, a copy of

the findings and a map identifying the lands included in the irrigation non-expansion area are public records of the department and shall be available for examination by the public during regular business hours.

C. The director shall file a true copy of the map in the office of the county recorder of the county or counties in which the irrigation non-expansion area is located.

§ 45-437. Irrigated acreage; water measuring device; transportation

A. In an initial irrigation non-expansion area established pursuant to § 45-431, only acres of land which were legally irrigated at any time between January 1, 1975 and January 1, 1980 may be irrigated, and an irrigation user or his successor may irrigate in any one year only the highest number of acres the user irrigated in any one year in the five years between January 1, 1975 and January 1, 1980.

B. In a subsequent irrigation non-expansion area established pursuant to § 45-432, only acres of land which were irrigated at any time during the five years preceding the notice of the initiation of the procedures to designate the irrigation non-expansion area may be irrigated, and an irrigation user or his successor may irrigate in any one year only the highest number of acres the user has irrigated in any one year in the five years preceding the notice of the initiation of the procedures to designate the irrigation non-expansion area.

C. In an irrigation non-expansion area:

1. Each person withdrawing groundwater from a non-exempt well shall use a water measuring device approved by the director and shall file a report on a calendar year basis with the director on a form provided by the director no later than March 31 of the following year.

2. Transportations of groundwater are subject to the provisions of article 8 of this chapter.[1]

[1] Section 45-541 et seq.

§ 45-438. Review and modification of boundaries of irrigation non-expansion areas

A. The director may review and modify the boundaries of an irrigation non-expansion area as conditions require and factual data justify.

B. The director shall review the boundaries of an irrigation non-expansion area upon receipt of a petition signed by persons who together withdraw not less than one-fourth of the groundwater withdrawn in the irrigation non-expansion area.

C. Before modifying the boundaries of an irrigation non-expansion area, the director shall give notice of and hold a hearing on the proposed modifications pursuant to the procedures prescribed by § 45-435. After the hearing, the director shall prepare written findings pursuant to § 45-436.

§ 45-439. Conversion from irrigation non-expansion area to active managment area; director; local initiation; procedures

A. The director may designate an irrigation non-expansion area as an active management area if the director determines that the irrigation non-expansion area meets any of the criteria for designating an active management area specified in § 45-412, subsection A.

B. Any action taken under this section is subject to the procedures for notice and hearing prescribed by §§ 45-413 and 45-414.

C. An irrigation non-expansion area may be designated an active management area upon petition and election pursuant to § 45-415 by the registered voters residing in the groundwater basin which is or includes the irrigation non-expansion area.

ARTICLE 4.
GROUNDWATER RIGHTS AND USES IN GENERAL

§ 45-451. Groundwater rights and uses in active management areas

A. In an active management area, a person may withdraw and use groundwater only in accordance with the provisions of article 5 through 12 of this chapter.[1]

B. This chapter shall not be construed to affect decreed and appropriative water rights.

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[1] Sections 45-461 et seq., 45-491 et seq., 45-511 et seq., 45-541 et seq., 45-561 et seq., 45-591 et seq., 45-611 et seq., 45-631 et seq.

§ 45-452. No new irrigated acreage in active management areas; central Arizona project water; agricultural experimentation; definition

A. In an initial active management area, except as provided in subsections B and H of this section, only acres of land which were legally irrigated at any time from January 1, 1975 through January 1, 1980, which are capable of being irrigated, which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469 and for which the irrigation grandfathered right has not been conveyed for a non-irrigation use, may be irrigated with any water. In an initial active management area, land which was not irrigated at any time from January 1, 1975 through January 1, 1980 is deemed to have been in irrigation if the director finds that either of the following apply:

1. In areas of an initial active management area not designated as critical groundwater areas under prior statutory law prior to the date of the designation of the active management area, land is deemed to have been in irrigation if substantial capital investment has been made for the subjugation of such land for an irrigation use including on-site irrigation distribution facilities and a well or wells the

drilling and construction of which were substantially commenced prior to the date of the designation of the active management area.

2. In areas of an initial active management area which were designated as critical groundwater areas under prior statutory law, land is deemed to have been in irrigation if substantial capital investment has been made in the twelve months before June 12, 1980 for the improvement of the land and on-site irrigation distribution facilities, including the drilling of wells, for an irrigation use. This paragraph does not allow irrigation of land which could not have been legally irrigated under prior statutory law.

B. In an initial active management area, a person who owns acres of land which may be irrigated pursuant to subsection A of this section may apply to the director during the central Arizona project contracting period, but no later than January 1, 1985, to permanently retire all or a portion of such acres from irrigation and to irrigate conjunctively with central Arizona project water the same number of substitute acres. The director may approve the substitution of acres if the director determines that all of the following exist:

1. The substitute acres were legally irrigated during the period of September 30, 1958 to September 30, 1968, or such other period as the United States secretary of the interior may designate.

2. The acres to be retired from irrigation and the substitute acres are located outside of the exterior boundaries of the service area of a city, town or private water company and such acres are located within the same irrigation district and the same sub-basin.

3. The substitution of acres is necessary to enable the irrigation district within which the acres are located to contract for and deliver central Arizona project water.

4. Central Arizona project water available to the irrigation district within which the acres are located will be ade-

quate to supply the substitute acres.

5. The substitution of acres will benefit the management of the active management area in which the acres are located.

C. The director shall give notice of an application to substitute acres pursuant to subsection B of this section once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in the active management area in which the irrigation district is located. The notice shall state that written objections to the substitution of acres may be filed by persons residing in the active management area in writing with the director within thirty days after the last publication of notice and that objections are limited to whether the application meets the criteria for substitution of acres as set forth in subsection B of this section. An objection shall state the name and mailing address of the objector, be signed by the objector, his agent or attorney and clearly set forth reasons why the substitution should not be allowed. In appropriate cases, including cases where a proper written objection has been filed, the director may hold a hearing. The director shall, thirty days prior to the date of the hearing, give notice in the manner described in this section. A hearing shall be conducted as provided in § 45-480, subsection B.

D. Any acres permanently retired from irrigation pursuant to subsection B of this section relinquish their irrigation grandfathered rights, and such rights are deemed to be appurtenant to the substitute acres. Groundwater withdrawn or received for the irrigation of the substitute acres pursuant to an irrigation grandfathered right shall be reduced by the amount of central Arizona project water received for such acres.

E. The service area of the irrigation district in which the acres are located shall be modified to permanently delete the acres permanently retired from irrigation and include the substitute acres.

F. If a person retires land from irrigation pursuant to subsection B of this section, groundwater shall not be withdrawn from such retired land for any purpose unless pursuant to a groundwater withdrawal permit or unless withdrawn by a city, town or private water company within the service area of such city, town or private water company.

G. In a subsequent active management area, except as provided in subsection H of this section, only acres of land which were legally irrigated at any time during the five years preceding the date of the designation of the active management area, which are capable of being irrigated, which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469 and for which the irrigation grandfathered right has not been conveyed for a non-irrigation use, may be irrigated with any water.

H. In an active management area, a state university engaged in the teaching, study of and experimentation in the science of agriculture may irrigate not more than three hundred twenty acres of land for such purposes with not more than five acre-feet of groundwater per acre per year. Water produced from any well pursuant to this subsection shall not be leased, sold or transported off the irrigated land operated by the state university. The right to withdraw and use groundwater pursuant to this subsection does not require a withdrawal permit, is not a grandfathered right, shall not give rise to a grandfathered right and may not be conveyed to any other user.

§ 45-453. Groundwater rights and uses in areas outside active management areas; amounts; transportation; irrigation non-expansion areas

In areas outside of active management areas, a person may:

1. Withdraw and use groundwater for reasonable and beneficial use.

2. Transport groundwater pursuant to article 8 of this chapter.[1]

3. Use groundwater for irrigation purposes within the exterior boundaries of an irrigation non-expansion area only pursuant to article 3 of this chapter.[2]

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[1] Section 45-541 et seq.

[2] Section 45-531 et seq.

§ 45-454. Exemption of small domestic wells

Withdrawals of groundwater for domestic purposes including the non-commercial irrigation of not more than one acre of land from wells having a pump with a maximum capacity of not more than thirty-five gallons per minute are exempt from the provisions of this chapter except that:

1. A person withdrawing groundwater from an exempt well shall register the well with the director pursuant to § 45-593.

2. A person shall file notice of intention to drill with the director pursuant to § 45-596 before drilling an exempt well or causing an exempt well to be drilled and an exempt well shall comply with the well construction standards prescribed pursuant to § 45-594.

§ 45-455. Application to state lands

This chapter applies to all lands owned by the state of Arizona and any of its political subdivisions.

ARTICLE 5. GRANDFATHERED GROUNDWATER RIGHTS IN ACTIVE MANAGEMENT AREAS

§ 45-461. Definitions

In this article, unless the context otherwise requires:

1. "Certificate of exemption" means a certificate which was issued by the state land department or Arizona water commission under prior statutory law for the purpose of describing specific uses and amounts of water which could

not be enjoined if found to constitue the transfer or transportation of groundwater.

2. "Development plan" means a plan for the non-irrigation use of land in connection with which land has been or will be retired from irrigation for the bona fide purpose of conserving or using water for such non-irrigation use which would otherwise be used to irrigate the retired land.

3. "Owner" means:

(a) With respect to an irrigation grandfathered or a type 1 non-irrigation grandfathered right, the owner of the land to which the right is appurtenant.

(b) With respect to a type 2 non-irrigation grandfathered right, the owner of the land from which groundwater is withdrawn pursuant to the right.

4. "Same ownership" means ownership by the same person or entity or by successor persons or entities as a result of succcession to heirs and personal representatives, corporate and partnership reorganizations, mergers, dissolutions, divestitures, partneships, partitions, joint ventures, foreclosures, receivership or bankruptcy, purchase of capital stock, sale pursuant to United States Code, title 11 or similar succession, but not by outright sale to a bona fide purchaser for value where no portion of or beneficial interest in the successor in interest is retained by the original owner, its shareholders, partners, limited partners or beneficiaries.

5. "Water duty acres" means the acres of land in a farm, as determined pursuant to § 45-465, subsection B, which are used in calculating the maximum amount of groudnwater which may be used pursuant to an irrigation grandfathered right.

§ 45-462. Grandfathered groundwater rights; persons included; certificate of exemption amount is legal use

A. In an active management area, a person who was legally withdrawing and using groundwater as of the date of the designation of the active management area or who owns land legally entitled to be irrigated with groundwater as determined pursuant to this article has the right to withdraw or receive and use groundwater as determined by the director pursuant to this article.

B. For purposes of determining grandfathered rights pursuant to this article, a groundwater use shall not be determined to be illegal merely because the groundwater legally withdrawn is or has been transported.

C. The amount of groundwater use described by an application for a certificate of exemption is recognized as a legal use for purposes of determining grandfathered rights pursuant to § 45-464, subject to any modification as a result of a finding on appeal of a factual mistake by the state land department or Arizona water commission in computing the amount of the authorized withdrawal.

D. The right to withdraw or receive and use groundwater pursuant to this article is a grandfathered right. There are three categories of grandfathered rights as follows:

1. Non-irrigation grandfathered rights associated with retired irrigated land as determined pursuant to §§ 45-463, 45-469 and 45-472.

2. Non-irrigation grandfathered rights not associated with retired irrigated land as determined pursuant to § 45-464.

3. Irrigation grandfathered rights as determined pursuant to § 45-465.

§ 45-463. Type 1 non-irrigation grandfathered right associated with retired irrigated land; appurtenancy; ownership

A. In an initial active management area, a person who owns land which was legally entitled to be irrigated with groundwater and who retired such land from irrigation

after January 1, 1965 but prior to the date of the designation of the active management area in anticipation of a non-irrigation use has the right to withdraw from or receive for such land three acre-feet of groundwater per acre per year upon showing that:

1. The land has been held under the same ownership since it was retired.

2. A development plan for the proposed non-irrigation use existed at the time the land was retired.

B. In a subsequent active management area, a person who owns land which was legally entitled to be irrigated with groundwater and retires such land from irrigation prior to the date of the designation of the active management area in anticipation of a non-irrigation use has the right to withdraw from or receive for such land the lesser of three acre-feet of groundwater per acre per year or the average annual amount of groundwater which was used per acre during the five years preceding the time the land was retired upon showing that:

1. The land has been held under the same ownership since it was retired.

2. A development plan for the proposed non-irrigation use existed at the time the land was retired and is filed with the director within ninety days after the active management area is designated.

C. The development plan requirements of this section are deemed fulfilled if the land retired from irrigation has been described in an application for a certificate of exemption or if the land retired from irrigation is owned in conjunction with non-irrigation uses existing or for which substantial capital commitments have been incurred for the non-irrigation development of such land as of the date of the designation of the active management area.

D. The right to withdraw or receive groundwater pursu-

ant to this section is a non-irrigation grandfathered right associated with retired irrigated land, or a type 1 non-irrigation grandfathered right.

E. A type 1 non-irrigation grandfathered right is appurtenant to the acre of retired irrigated land associated with the right, is owned by the owner of the land to which the right is appurtenant and may be leased with the land.

§ 45-464. Type 2 non-irrigation grandfathered right not associated with retired irrigated land; determination of amount; ownership

A. In an active management area, a person who owns land from which groundwater was being legally withdrawn and used for a non-irrigation purpose as of the date of the designation of the active management area has the right to withdraw annually:

1. If the person holds a certificate of exemption, the greater of:

(a) The amount of groundwater established in proceedings on the application for certificate of exemption, subject to any modification as a result of a finding on appeal of a factual mistake by the state land department or Arizona water commission in computing the amount of the authorized withdrawal, less the amount of any right obtained by the person pursuant to § 45-463.

(b) The maximum amount of groundwater legally withdrawn from such land and used by the person in any one of the five years preceding the date of the designation of the active management area, less the amount of any right obtained by the person pursuant to § 45-463.

2. If the person does not hold a certificate of exemption, the maximum amount of groundwater legally withdrawn from such land and used by the person withdrawing the groundwater in any one of the five years preceding the date of the designation of the active management area, less the amount of any right obtained pursuant to § 45-463 by the

person withdrawing groundwater from such land which has not been subtracted by the person withdrawing the groundwater in calculating the amount of another right pursuant to this section.

B. If the calculation in subsection A of this section results in an amount greater than zero, that amount is a grandfathered right in addition to any right obtained pursuant to § 45-463.

C. For the purposes of this section, "person" includes:

1. A city, town or private water company which owns land outside of the service area of such city, town or private water company from which groundwater was being legally withdrawn for a non-irrigation gse as of the date of the designation of the active management area.

2. A city, town or private water company withdrawing groundwater from within its service area pursuant to a certificate of exemption.

3. Any other non-irrigation user.

D. If a person has been using groundwater for less than one year during the twelve months immediately preceding the date of the designation of the active management area, the amount of the grandfathered right pursuant to this section is the annual amount determined by the director to be reasonable for a full year to meet the requirements for a facility owned by such person in existence as of the date of the designation of the active management area.

E. The right to withdraw groundwater pursuant to this section is a non-irrigation grandfathered right not associated with retired irrigated land, or a type 2 non-irrigation grandfathered right.

F. A type 2 non-irrigation grandfathered right is owned by the owner of the land from whicch the groundwater is withdrawn and may be leased with such land.

G. If the user of a type 2 non-irrigation grandfathered

right is different from the owner of the right, either the owner, or the user of the right on behalf of the owner, may apply for a certificate of grandfathered right pursuant to § 45-476.

§ 45-465. Irrigation grandfathered right; determination of acres entitled to and amount; appurtenancy

A. In an active management area, a person who owns land which was legally irrigated at any time during the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas, which is capable of being irrigated and which has not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469, has the right to use groundwater for the irrigation of such land as determined pursuant to subsection B of this section.

B. The director shall compute the maximum amount of groundwater which may be used pursuant to this section as follows:

1. Determine the farm units, as defined in § 45-402, within the active management area.

2. Determine the irrigation water duty, as defined in § 45-402, for each farm unit in an active management area, pursuant to §§ 45-564 through 45-568.

3. Determine the water duty acres for each farm within the farm unit. The water duty acres are the highest number of acres in the farm, taking land rotation into account, which were legally irrigated during any one year in the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas.

4. Determine the irrigation acres for each farm within the farm unit. The irrigation acres are the acres in the farm which were legally irrigated at any time during the five years preceding January 1, 1980 for initial active manage-

ment areas or the date of the designation of the active management area for subsequent active management areas, which are capable of being irrigated and which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469.

5. Multiply the water duty acres for each farm within the farm unit by the irrigation water duty for the farm unit and divide that amount by the number of irrigation acres in the farm. The result shall be the maximum amount of groundwater which may be used per year for the irrigation of each irrigation acre in the farm. If the farm is irrigated solely with groundwater, the amount of groundwater used by the farm for irrigation shall be accounted for pursuant to § 45-467, subsection C. If a farm is irrigated with a combination of surface water and groundwater, the amount of groundwater used by the farm for irrigation shall be accounted for pursuant to § 45-467, subsections D and E.

C. The right to use groundwater pursuant to this section for the irrigation of an irrigation acre is an irrigation grandfathered right and is appurtenant to that acre. An irrigation grandfathered right is owned by the owner of the land to which it is appurtenant and may be leased for an irrigation use with the land to which it is appurtenant.

D. A person who owns or leases irrigation acres may use the total amount of groundwater allowed by the irrigation grandfathered right for such acres for the irrigation of all or a portion of such acres.

E. If the irrigation water duty for the farm unit in which an irrigation acre is located is reduced by the director pursuant to article 9 of this chapter, the amount of groundwater which may be used for the irrigation of such acre pursuant to the irrigation grandfathered right under this section is reduced accordingly.

F. For purposes of this chapter, the amount of groundwater which may be used or is used is the amount of

groundwater withdrawn by the groundwater user, measured at the point of withdrawal, and the amount of groundwater received by the groundwater user from an irrigation district or other source.

§ 45-466. Limitations on use of irrigation water duty; deliveries of water in excess of irrigation water duty

The irrigation water duty shall be used to determine the maximum amount of groundwater which may be used pursuant to § 45-465 and debits and credits to the operating flexibility account as set forth in § 45-467. The irrigation water duty shall not be applied to diminish surface water delivered to lands pursuant to appropriative surface water rights or decreed surface water rights.

§ 45-467. Withdrawals in excess of irrigation grandfathered right; withdrawals less than irrigation grandfathered right; operating flexibility account; conveyances; variance

A. A person who is entitled to use groundwater pursuant to an irrigation grandfathered right may:

1. Use groundwater in excess of the amount allowed by the right in an amount determined pursuant to subsection F of this section.

2. Use less than the amount allowed by the right in one accounting period and use the remaining amount allowed by the right in a succeeding accounting period or periods.

B. The director shall establish rules and regulations for the maintenance of an operating flexibility account for each farm in an active management area.

C. If a farm is irrigated solely with groundwater, the director shall:

1. Register a debit to the account in any accounting period in which the amount of groundwater used for the irrigation of the irrigation acres in the farm is greater than the current irrigation water duty for the farm multiplied by the water duty acres in the farm.

2. Register a credit to the account in any accounting period in which the amount of groundwater used for the irrigation of the irrigation acres in the farm is less than current irrigation water duty for the farm multiplied by the water duty acres in the farm.

D. If a farm is irrigated with surface water and groundwater, and uses of water by the farm from all sources for irrigation purposes in the accounting period:

1. Exceed the amount of the current irrigation water duty for the farm multiplied by the water duty acres in the farm, the amount of groundwater used up to the amount of the excess shall be registered as a debit to the account.

2. Are less than the amount of the current irrigation water duty for the farm multiplied by the water duty acres in the farm, the amount of water not used which would have been groundwater shall be registered as a credit to the account.

E. A person who uses a combination of surface water and groundwater for irrigation purposes may credit against his use of groundwater in an accounting period surface water released from storage facilities into a surface water distribution system to avoid spilling, if such surface water is actually applied to the person's land and would cause a debit to be incurred. The credit allowed under this subsection shall be applied only against the person's operating flexibility account debits which otherwise would have been incurred that year and shall not be used to discharge debits from prior years or accumulate credits for future years.

F. The maximum excess amount of groundwater that may be used pursuant to this section is equal to fifty per cent of the current irrigation water duty for the fam multiplied by the water duty acres in the farm. The operating flexibility account may not be in arrears at any time in excess of this amount. Groundwater equal to the credit balance in the operating flexibility account may be used at any time.

G. If an irrigation grandfathered right is conveyed for an irrigation use purusant to § 45-472, each acre conveyed shall carry with it a proportional share of any debits or credits in the operating flexibility account for the farm. If an irrigation grandfathered right is conveyed for a non-irrigation use pursuant to § 45-472, each acre conveyed shall carry with it a proportional share of any debits in the operating flexibility account for the farm.

H. A person using groundwater pursuant to an irrigation grandfathered right who is operating under a variance to the irrigation water duty pursuant to § 45-574:

1. May accumulate a maximum debit in an amount equal to fifty per cent of the current irrigation water duty for the farm multiplied by the water duty acres in the farm.

2. Shall accumulate credits pursuant to subsection C, D or E of this section.

I. A person using groundwater pursuant to an irrigation grandfathered right shall file a report with the director each year which shall include the amount of groundwater used pursuant to the irrigation grandfathered right and such other information as the director shall require. The director may consolidate the reporting requirements of this section with the reporting requirements of § 45-632.

§ 45-468. Accounting of water by persons delivering a combination of surface water and groundwater for irrigation uses

A. A person delivering a combination of surface water and groundwater for irrigation uses shall prior to the beginning of each accounting period estimate the amount of groundwater that will be withdrawn and delivered during the next accounting period and shall make such estimate available to the director. The estimate may be modified from time to time as conditions warrant.

B. Within ninety days following the end of each accounting period a person who delivers a combination of surface

water and groundwater for uses by cities, towns, private water companis, industries, farms or other users shall provide the director with an accounting for water during the past accounting period which shows the following:

1. All surface water provided to each class of user and each farm.

2. All groundwater provided to each class of user and each farm.

C. If a person delivers a combination of surface water and groundwater to users, the amount of groundwater charged to each user pursuant to the accounting in subsection B is the amount delivered directly to each user and a pro rata amount of any additional amount of groundwater which is commingled with surface water and delivered to all classes of users.

§ 45-469. Right to retire irrigation grandfathered right for non-irrigation use; development plan approval; amendment of plan prior to retirement; amount which may be withdrawn; service area determined

A. A person who owns land legally entitled to be irrigated with groundwater pursuant to an irrigation grandfathered right which is located within an active management area and outside of the exterior boundaries of the service area of a city, town or private water company has the right to retire such land from irrigation in anticipation of a future non-irrigation use and shall not forfeit or abandon the right to withdraw from or receive for such land the amount of groundwater calculated pursuant to subsection F of this section for a non-irrigation use if:

1. The land is held in the same ownership.

2. A development plan for the proposed non-irrigation use exists and is approved by the director within a reasonable time before or after the land is retired.

B. The director shall approve the development plan

required by subsection A of this section if it appears that the land:

1. Has been or will be retired for the bona fide purpose of conserving or using water for a non-irrigation use which would otherwise continue to be used for irrigation of such land.

2. Has not been sold or taken out of production primarily because it would have been uneconomical to continue to withdraw water for irrigation.

C. The director shall not investigate the legality, other than pursuant to this chapter, feasibility or other factors involved in the proposed development plan and shall not disapprove a development plan on such grounds.

D. A development plan may be amended and the director shall approve amendments if the criteria of this section are met.

E. A person proposing to retire irrigated land which is located inside or outside of an active management area may apply to the director for approval of a proposed development plan prior to the retirement of such land.

F. The amount of groundwater which may be withdrawn or received annually per acre pursuant to this section is the lesser of:

1. The current maximum amount of groundwater which may be used pursuant to the irrigation grandfathered right for the acre at the time it is retired, as calculated pursuant to § 45-465, subsection B.

2. Three acre-feet multiplied by the water duty acres in the farm in which the acre to which the right is appurtenant is located divided by the number of irrigation acres in the farm.

G. The right to withdraw or receive groundwater pursuant to this section is a non-irrigation grandfathered right associated with retired irrigated land, or a type 1 non-irrigation grandfathered right as described in § 45-463.

H. Whether the land to which an irrigation grandfathered right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company shall be determined as of the date the development plan is filed with the director acording to the most current map of the service area of the city, town or private water company available for public inspection on that date as required by § 45-498:

1. In the city clerk's office for a city.

2. In the town clerk's office for a town.

3. In the appropriate county recorder's office for a private water company.

§ 45-470. Use of type 1 non-irrigation grandfathered right by original owner

A. The original owner of a type 1 non-irrigation grandfathered right pursuant to § 45-463 or 45-469 may:

1. Use groundwater withdrawn pursuant to the right for any non-irrigation use:

(a) On the land to which the right is appurtenant.

(b) On any other land, subject to the provisions governing transportation of groundwater in article 8 of this chapter,[1] except that, if the land to which the right is appurtenant is included within the exterior boundaries of the service area of a city, town or private water company, use groundwater on other land only if the use on other land was commenced prior to the date of the designation of the active management area or is pursuant to a development plan filed with the director prior to the inclusion of the land within the exterior boundaries of the service area of the city, town or private water company.

2. Pursuant to § 45-473, convey retired irrigated land with the appurtenant type 1 non-irrigation grandfathered

[1] Section 45-541 et seq.

right. Any land not conveyed shall retain its appurtenant type 1 non-irrigation grandfathered right.

B. For the purposes of this section, "original owner" means:

1. The person who acquired and retired land from irrigation prior to the date of the designation of the active management area pursuant to § 45-463 and any person or entity who holds such land under the same ownership as defined by § 45-461.

2. The person who retires legally irrigated land after the date of the designation of the active management area pursuant to § 45-469 and any person or entity who holds such land under the same ownership as defined by § 45-461.

§ 45-471. Use of type 2 non-irrigation grandfathered right by owner

A. The owner of a type 2 non-irrigation grandfathered right pursuant to § 45-464 may use groundwater withdrawn pursuant to the right for any non-irrigation purpose at any location, subject to the provisions governing transportation of groundwater in article 8 of this chapter, except that, if the right is based on withdrawals of groundwater:

1. For the extraction or processing of minerals, the owner may use groundwater withdrawn pursuant to the right only for the purpose of mineral extraction or processing.

2. For the generation of electrical energy, the owner may use groundwater withdrawn pursuant to the right only for electrical energy generation.

B. If a type 2 non-irrigation grandfathered right is leased, the lessee may use groundwater withdrawn pursuant to the right subject to the provisions of subsection A of this section.

§ 45-472. Conveyance of irrigation grandfathered right; within service area; outside service area; change to non-irri-

gation grandfathered right; forfeiture of right to convey to non-irrigation use

A. The owner of an irrigation grandfathered right may convey the right only with the land to which the right is appurtenant.

B. If the land to which an irrigation grandfathered right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company:

1. The irrigation grandfathered right may be conveyed only for an irrigation use, except for expanded animal industry use or as provided in paragraphs 2 and 3 of this subsection. If an irrigation grandfathered right is conveyed for an irrigation or expanded animal industry use, the full amount of the right is conveyed. The amount of groundwater conveyed pursuant to the right:

(a) For an irrigation use may be withdrawn by the new owner of the right only from the land to which the right is appurtenant and used on that land or on continguous irrigation acres under common ownership within the service area of the city, town or private water company, except that, if the groundwater was delivered by an irrigation district to the previous owner of the right, the irrigation district may continue to deliver groundwater to the new owner pursuant to the right for use on the land to which the right is appurtenant or on continguous irrigation acres under common ownership within the service area of the city, town or private water company. For purposes of this section, irrigation acres which are separated by a road, highway, easement or right-of-way from the land to which the irrigation grandfathered right is appurtenant are deemed to be contiguous.

(b) For an expanded animal industry use may be withdrawn by the new owner of the right only from the land to which the right is appurtenant and used on that land or on any other land, subject to the provisions of article 8 of this chapter relating to transportation of groundwater. If the groundwater was delivered by an irrigation district to th

previous owner of the right, the irrigation district may continue to deliver groundwater to the new owner pursuant to the right. If any portion of the amount of groundwater conveyed is withdrawn by the new owner and used on other land, no additional groundwater may be withdrawn for use on the land to which the right is appurtenant.

2. The irrigation grandfathered right may be conveyed to an industry engaged in the generation of electrical energy for the purpose of electrical energy generation, except that, if the facility for the generation of electrical energy is not subject to title 40, chapter 2, article 6.2,[1] the conveyance is subject to the approval of:

(a) The appropriate city or town, if the irrigation grandfathered right to be conveyed is appurtenant to land within the exterior boundaries of the service area of a city or town.

(b) The director, if the irrigation grandfathered right to be conveyed is appurtenant to land within the corporate limits of a city or town and within the exterior boundaries of the service area of a private water company.

3. If an irrigation grandfathered right is conveyed for a non-irrigation use pursuant to paragraph 2 of this subsection, the amount of the right that is conveyed is the lessor of:

(a) The current maximum amount of groundwater which may be used pursuant to the right, as calculated pursuant to § 45-465, subsection B.

(b) Three acre-feet per year multiplied by the number of water duty acres in the farm in which the acre to which the right is appurtenant is located divided by the number of irrigation acres in the farm.

4. The new owner of an irrigation grandfathered right conveyed pursuant to paragraph 2 of this subsection may withdraw the amount of groundwater conveyed pursuant to that right, as determined in paragraph 3 of this subsection, only from the land to which the right is appurtenant and use the groundwater on that land, but may not use the

[1] Section 40-360 et seq.

groundwater on other land, except that, if the groundwater was delivered by an irrigation district to the previous owner of the right, the irrigation distict may continue to deliver groundwater to the new owner pursuant to the right for use on the land to which the right is appurtenant.

C. If the land to which an irrigation grandfathered right is appurtenant is included within the exterior boundaries of the service area of a city, town or private water company subsequent to the date of the designation of an active management area, the owner of the right may, with the approval of the director and consistent with the provisions of this chapter, convey the grandfathered right for a non-irrigation use, other than an expanded animal industry use, on the land to which the right is appurtenant, upon a showing that adequate water service is unavailable at rates comparable to rates charged similar classes of water users within such service area. The amount of the right conveyed is determined pursuant to subsection B, paragraph 3 of this section.

D. If the land to which an irrigation grandfathered right is appurtenant is outside of the exterior boundaries of the service area of a city, town or private water company:

1. The irrigation grandfathered right may be conveyed for an irrigation use or a non-irrigation use. If an irrigation grandfathered right is conveyed for an irrigation or an expanded animal industry use, the full amount of the right is conveyed. If an irrigation grandfathered right is conveyed for a non-irrigation use, other than an expanded animal industry use, the amount of the right that is conveyed is the lesser of:

(a) The current maximum amount of groundwater which may be used pursuant to the right as calculated pursuant to § 45-465, subsection B.

(b) Three acre-feet per year multiplied by the number of water duty acres in the farm in which the acre to which the right is appurtenant is located divided by the number of irrigation acres in the farm.

2. The amount of groundwater conveyed pursuant to the right, as determined in paragraph 1 of this subsection, may be withdrawn by the new owner of the right only from the land to which the right is appurtenant and used on that land or on any other land, subject to the provisions of article 8 of this chapter[2] relating to transportation of groundwater, except that, if the groundwater was delivered by an irrigation district to the previous owner of the right, the irrigation district may continue to deliver groundwater to the new owner pursuant to the right. If any portion of the amount of groundwater conveyed is withdrawn by the new owner and used on other land, no additional groundwater may be withdrawn for use on the land to which the right is appurtenant, except that, if the new owner is an industry, it may withdraw a portion of the amount of groundwater conveyed for use on other land and withdraw the remainder of the amount of groundwater conveyed for municipal and industrial use on the land to which the right is appurtenant for purposes directly related to the industry's industrial operation.

E. For purposes of this section, "land to which the right is appurtenant" means the acre or group of contiguous acres conveyed with an irrigation grandfathered right.

F. If an irrigation grandfathered right is conveyed for a non-irrigation use, the new owner's right to withdraw or receive groundwater is a non-irrigation grandfathered right associated with retired irrigated land, or a type 1 non-irrigation grandfathered right. All subsequent conveyances of that right are governed by § 45-473.

G. The amount of a type 1 non-irrigation grandfathered right shall be determined at the time it is established and shall remain fixed at that amount.

H. If an irrigation grandfathered right has not been retired in anticipation of a future non-irrigation use and has

[2] Section 45-541 et seq.

not been exercised for five consecutive years, the right may not be conveyed for a non-irrigation use.

§ 45-473. Conveyance of type 1 non-irrigation grandfatherd[1] right; use by new owner; appurtenancy; within service area; outside service area

A. The owner of a type 1 non-irrigation grandfathered right may convey the right only for a non-irrigation use and only with the land to which it is appurtenant. For purposes of this section, a type 1 non-irrigation grandfathered right means a non-irrigation grandfathered right associated with retired irrigated land pursuant to § 45-463 or 45-469 or an irrigation grandfathered right which was conveyed for a non-irrigation use pursuant to § 45-472.

B. If a type 1 non-irrigation grandfathered right is conveyed, the full amount of the right is conveyed.

C. If the land to which a type 1 non-irrigation grandfathered right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company, the amount of ground water conveyed pursuant to the right may be withdrawn by the new owner of the right only from the land to which the right is appurtenant. The groundwater may be used on the land to which the right is appurtenant, but may not be used on other land unless the use on other land was commended prior to the date of the designation of the active management area or was commenced by the original owner of the right pursuant to a development plan filed with the director prior to the inclusion of the land within the exterior boundaries of the service area of the city, town or private water company.

D. If the land to which the type 1 non-irrigation grandfathered right is appurtenant is outside of the exterior boundaries of the service area of a city, town or private water company, the amount of groundwater conveyed pursuant to the right may be withdrawn by the new owner of the right only from the land to which the right is appur-

tenant and used on that land or on any other land, subject to the provisions of article 8 of this chapter relating to transportation of groundwater. If any portion of the amount of groundwater conveyed is withdrawn by the new owner and used on other land, no additional groundwater may be withdrawn for use on the land to which the right is appurtenant, except that, if the new owner is an industry, it may withdraw a portion of the amount of groundwater conveyed for use on other land and withdraw the remainder of the amount of groundwater conveyed for municipal and industrial use on the land to which the right is appurtenant for purposes directly related to the industry's industrial operation.

E. For purposes of this section, "land to which the right is appurtenant" means the acre or group of contiguous acres conveyed with a type 1 non-irrigation grandfathered right.

F. If groundwater was delivered by an irrigation district to the previous owner of a type 1 non-irrigation grandfathered right, the irrigation district may contiue to deliver groundwater pursuant to the right to the new owner of the right.

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[1] So in original. Probably should read "grandfathered".

§ 45-474. Conveyance of type 2 non-irrigation grandfathered right; amount

A. The owner of a type 2 non-irrigation grandfathered right may convey the right for any non-irrigation use except that:

1. A type 2 non-irrigation grandfathered right that is used for purposes of mineral extraction or processing may be conveyed only for a mineral extraction or processing use.

2. A type of 2 non-irrigation grandfathered right that is used for purposes of electrical energy generation may be

conveyed only for an electrical energy generation use.

B. A type 2 non-irrigation grandfathered right may not be conveyed for an irrigation use.

C. If a type 2 non-irrigation grandfathered right is conveyed, the full amount of the right is conveyed.

§ 45-475. Determinationn[1] of exterior boundaries of service area for purposes of conveyances

For purposes of conveyances of irrigation grandfathered rights and type 1 non-irrigation grandfathered rights, whether land to which the right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company shall be determined as of the date of the closing of the conveyance transaction according to the most current map of the service area of the city, town or private water company available for public inspection on that date as required by § 45-498:

1. In the city clerk's office for a city.

2. In the town clerk's office for a town.

3. In the appropriate county recorder's office for a private water company.

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[1] So in original. Probably should be "Determination".

§ 45-476. Application for certificate of grandfathered right

A. A person claiming the right to withdraw or receive and use groundwater pursuant to a grandfathered right shall file an application for a certificate of grandfathered right with the department not later than fifteen months after the date of the designation of the active management area on a form provided by the department.

B. The application for a certificate of grandfathered right not based upon prior proceedings on a certificate of exemption shall include the following:

1. The name and mailing address of the applicant.

2. The name of the active management area within which the withdrawal of groundwater pursuant to the claimed grandfathered right is being or has been made.

3. If the application is for a type 1 non-irrigation grandfathered right:

(a) The legal description and a map of the retired irrigated land in respect of which the right is claimed.

(b) The date when the irrigated land was retired.

(c) Such evidence as the director shall require that the retired irrigated land has been held under the same ownership since it was retired and that a development plan for the proposed non-irrigation use existed at the time the land was retired.

(d) If in a subsequent active management area, the amount of groundwater used per acre for the retired irrigated land each year during the five years preceding the time the land was retired.

4. If the application is for a type 2 non-irrigation grandfathered right:

(a) The maximum amount of groundwater legally withdrawn from land owned by the applicant and used in any one year during the five years preceding the date of the designation of the active management area.

(b) If the person withdrawing groundwater from the land owned by the applicant has made application for a type 1 non-irrigation grandfathered right, a copy of the application.

5. If the application is for an irrigation grandfathered right:

(a) The legal description and a map of all land owned by the applicant which was legally irrigated at any time during the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas and the highest number of acres legally irri-

gated with groundwater at one time in any one year during the five-year period.

(b) The type of crops grown on such land and the cropping patterns used during the five-year period.

(c) The irrigation methods and devices currently being used in the irrigation of such land.

6. The location of each well from which groundwater is being or has been withdrawn by the applicant to irrigate such land.

7. The sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

8. Any other information the director may require.

C. A person or his successor claiming the right to use groundwater pursuant to a grandfathered right, described in whole or in part by a certificate or exemption, shall file an application for a certificate of grandfathered right as provided in subsection D and shall automatically be entitled to a certificate or certificates of grandfathered right for the portion of the grandfathered right claimed which is evidenced by the certificate of exemption or established by the proceedings on the certificate of exemption. Notice of the application is not required and hearings shall not be held. If the applicant claims grandfathered rights in addition to the amount of use described in the certificate of exemption, application for such additional amount shall be made pursuant to subsection B, and such application is subject to the notice, objection and hearing provisions applicable to applications made pursuant to that subsection.

D. The application for a certificate of grandfathered right based upon prior proceedings upon an application for a certificate of exemption shall include the following:

1. The name and mailing address of the applicant.

2. The name of the active management area within

which the withdrawal of groundwater pursuant to the claimed grandfathered right is being or has been made.

3. The total amount of groundwater to be withdrawn annually under the certificate of exemption.

4. The number of retired irrigated acres described in the application for a certificate of exemption.

5. Such evidence as the director shall require that the retired irrigated land has been held under the same ownership since it was retired.

6. The number of the certificate of exemption and a copy of the certificate of exemption.

7. The sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

8. Any other information the director may require.

§ 45-477. Waiver and relinquishment of grandfathered right

A person who claims the right to withdraw or receive and use groundwater pursuant to a grandfathered right but who fails to file an application for a certificate of grandfathered right as provided in this article is deemed to waive and relinquish any right to withdraw or receive and use groundwater pursuant to this article.

§ 45-478. Notice of requirement to apply for certificate of grandfathered right

A. Within ninety days of the date of the designation of an active management area, the director shall give notice of the requirement to apply for a certificate of grandfathered right to the clerk of the board of supervisors of the county or counties in which the active management area is located and to the mayor of each city or town, to each private water company and to the presiding officer of each political subdivision established pursuant to chapter 4, 5, 6 or 7 of this title[1] located in the active management area.

[1] Section 45-901 et seq., 45-1201 et seq., 45-1501 et seq., or 45-1901 et seq.

B. The director shall mail by January 1, following the date of the designation of the active management area, a copy of a written notice of the requirement to apply for a certificate of grandfathered right to each owner of real property within the active management area listed on the tax rolls of the county, except owners of real property located in vacant subdivisions or located within the service area of cities, towns and private water companies, along with a declaration that it is the duty of the recipient to forward the notice to the beneficial owner of the property. The notice shall include a statement that a person who fails to apply for a certificate of grandfathered right within an active management area waives and relinquishes any right to withdraw or receive and use groundwater pursuant to a grandfathered right.

C. The director shall also notify owners of real property located within service areas of cities, towns and private water companies and irrigation districts who utilize their own well, according to the registration of the well pursuant to article 10 of this chapter. The director may extend for a reasonable time the deadline for applications under this subsection.

D. The director may also give written notice in any other manner which will carry out the purposes of this section.

§ 45-479. Registry of applications for certificates; written objections; request for hearing

A. The director shall establish a registry of all applications received for a certificate of grandfathered right for each active management area. After the deadline for the filing of applications has passed, the director shall notify all applicants for a certificate of grandfathered right that the registry is available in the offices of the department for public inspectDon during regular business hours.

B. Within one hundred eighty days of the date of the notice required by subsection A, any person residing in the

active management area may file a written objection to any application for a certificate of grandfathered right and may request a hearing on the application. Objections may be made only on the basis that the information in the application is incorrect or is insufficient to issue a certificmte.

§ 45-480. Review of applications; investigations; hearings; final determination; appeal

A. The director shall review each application for a certificate of grandfathered right and may conduct such investigations as deemed necessary to determine whether the information contained in the application is correct and sufficent to issue a certificate. Except as provided in § 45-476, subsection C, the director may in appropriate cases, including cases in which a written objection has been filed, hold a hearing to determine whether the information contained in the application is correct and sufficient to issue a certificate. Thirty days prior to the date of the hearing, the director shall give notice of the hearing to the applicant and any person who has filed an objection to the application.

B. If a hearing is held, it shall be conducted by a department hearing officer in the active management area in which the use is located. The proceedings shall be recorded manually or electronically and shall be transcribed on request and at the expense of the requesting party. A hearing shall be conducted in an informal manner without adhering to the rules of evidence required in judicial proceedings. All parties, including the department, shall have an opportunity to present evidence and argument on all issues involved and to be represented by counsel. The hearing officer shall issue findings and recommend a decision to the director. The director shall issue a decision and an order either affirming or modifying the hearing officer's determination within six months of the notice of the hearing.

C. If the director determines that the information contained in the application is correct and is sufficient to issue

a certificate of grandfathered right, the director shall issue a certificate of grandfathered right to the applicant pursuant to § 45-481. If the director determines that the information contained in the application is incorrect or is insufficient to issue a certificate, the director may return the application specifically stating the reasons for its return. The applicant may reapply within thirty days of receipt of the returned application. A reapplication relates back to the filing of the original application but otherwise shall be treated as a new application.

D. If the director determines that the applicant is not entitled to a certificate of grandfathered right or determines that the amount of a type 1 or type 2 non-irrigation grandfathered right is less than that requested in the application, the director shall hold a hearing pursuant to subsection B of this section.

E. The applicant or any person entering an objection to the application may appeal to the superior court in the county in which the irrigated land or non-irrigation use is located pursuant to § 45-405.

§ 45-481. Issuance of certificates; contents; recordation

A certificate of grandfathered right shall be issued in recordable form and shall contain:

1. The name and mailing address of the person to whom the certificate is issued.

2. The active management area in which the withdrawal of groundwater is being or will be made.

3. The type of grandfathered right represented by the certificate.

4. If the certificate is for a type 1 non-irrigation grandfathered right, the amount of the right and the legal description of the retired irrigated land to which the right is appurtenant.

5. If the certificate is for a type 2 non-irrigation grandfathered right, the amount of the right.

6. If the certificate is for an irrigation grandfathered right, the legal description of the irrigable land to which the right is appurtenant.

7. Where applicable, the location of each well from which groundwater is being withdrawn pursuant to the right at the time the certificate is issued.

8. Such other pertinent information as the director may determine.

§ 45-482. Registry of certificates of grandfathered right; reporting

A. The director shall establish and maintain a registry of certificates of grandfathered rights for each active management area. The registry shall include a copy of each certificate of grandfathered right in the active management area and such other pertinent information as the director determines is necessary.

B. A person to whom a certificate of grandfathered right is issued shall notify the director of a change in name or mailing address or a conveyance of the grandfathered right pursuant to §§ 45-472 through 45-474. A person to whom a grandfathered right is conveyed shall notify the director of the conveyance and shall furnish information as required by the director to keep the registry current and accurate. The director shall have continuing jurisdiction and shall issue revised certificates as necessary.

C. The director may require holders of certificates of grandfathered rights to file additional information with the annual report required by § 45-632 as necessary to keep the registry current and accurate. For purposes of this article, "holder" means a person to whom a certificate of grandfathered right is issued or a person to whom a grandfathered right is conveyed.

ARTICLE 6. GROUNDWATER RIGHTS AND USES WITHIN SERVICE AREAS

§ 45-491. Scope of article

In an active management area, a city, town, private water company or irrigation district may withdraw groundwater only pursuant to this article, except as provided by a grandfathered right.

§ 45-492. Withdrawals by cities, towns and private water companies within services areas; contract to supply groundwater

A. In an active management area, a city, town or private water company shall have the right to withdraw and transport groundwater within its service area for the benefit of landowners and residents within its service area, and the landowners and residents are entitled to use the groundwater delivered, subject to:

1. The provisions of article 8 of this chapter[1] relating to transportation of groundwater.

2. Conservation requirements developed by the director pursuant to article 9 of this chapter.[2]

B. Claims of landowners to irrigation grandfathered rights or type 1 or 2 non-irrigation grandfathered rights shall be subject to the provisions of article 5 of this chapter.[3]

C. A city or town may contract to supply groundwater to a city, town or private water company in the same active management area if it is consistent with the management plan for the active management area and is approved by the director.

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[1] Section 45-541 et seq.
[2] Section 45-561 et seq.
[3] Section 45-461 et seq.

§ 45-493. Limitations on extensions of service areas; prohibition on formation of private water company for irrigation purpose

A. In an active management area, the service area of a city, town or private water company may not be extended primarily for any of the following purposes:

1. Including a well field within the service area.

2. Furnishing disproportionately large amounts of water to an industrial or any other large water user unless it is consistent with the management plan for the active management area and is approved by the director.

3. Including irrigation acres within the exterior boundaries of the service area to extinguish the right to convey irrigation grandfathered rights to a non-irrigation use.

B. Within an active management area, a city, town or private water company may not extend its service area for the purpose of withdrawing and distributing groundwater for irrigation purposes.

C. Subsequent to the date of the designation of the active management area, a private water company may not be formed within an active management area to withdraw and distribute groundwater for irrigation purposes.

§ 45-494. Withdrawals by irrigation districts in initial active management areas

In an initial active management area established pursuant to § 45-411:

1. An irrigation district existing and engaged in the withdrawal, delivery and distribution of groundwater as of January 1, 1977 shall have the right, subject to § 45-496:

(a) To withdraw and transport groundwater within its service area for the benefit of landowners within its service area, and the landowners are entitled to use the groundwater deliverd, provided claims of landowners to irrigation

grandfathered rights or type 1 or 2 non-irrigation grandfathered rights shall be subject to the provisions of article 5 of this chapter.[1]

(b) If legally withdrawing and transporting groundwater from outside its service area for use within its service area as of January 1, 1977, to continue to withdraw and transport the amount of groundwater legally being withdrawn as of January 1, 1977.

2. An irrigation district which was not engaged in the withdrawal, delivery and distribution of groundwater as of January 1, 1977 shall be limited to the right, subject to § 45-496, to:

(a) Contract for surface water from a multi-county water conservation district and deliver and distribute such water within its service area for irrigation purposes.

(b) Contract to purchase, deliver and distribute effluent within its service area for irrigation purposes.

(c) Withdraw, deliver and distribute within its service area the amount of groundwater allowed by the current irrigation water duty of each member farm multiplied by the water duty acres in that farm less any portion of such amount withdrawn by individual members.

(d) Continue but not expand any non-irrigation water service being lawfully provided as of the date of the designation of the active management area, except as provided in § 45-497, subsection B.

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[1] Section 45-561 et seq.

§ 45-494.01. Addition and exlcusion of area by irrigation districts in initial active management areas

A. In an initial active management area, an irrigation district established pursuant to chapter 6 of this title[1] existing and engaged in the withdrawal, delivery and distribution of groundwater as of January 1, 1977 may add to the service area of the district acres of land which have irrigation grandfathered rights to replace other lands that have

irrigation grandfathered rights of similar area for the purpose of maintaining the same acreage as of June 12, 1980, if both of the following apply:

1. The added and excluded acres are outside the exterior boundaries of the service area of an incorporated city or town.

2. The added and excluded acres are either within the franchised area of a private water company designated as having an assured water supply pursuant to § 45-576, subsection D and the contiguous acres may, in the judgment of the director, be added without adversely affecting the assured water supply of the private water company.

B. No greater quantity of water may be transported annually to the added acres than the annual stored surface water allotment for that year. For purposes of this section, stored surface water does not include central Arizona project allotment water. This section does not prohibit the transportation to the added acres of any quantity of floodwater or effluent available in addition to the stored surface water allotment.

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[1] Section 45-1501 et seq.

§ 45-495. Withdrawals and transportations by irrigation districts within subsequent active management areas

In a subsequent active management area established pursuant to § 45-412:

1. An irrigation district existing and engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area shall have the right, subject to § 45-496:

(a) To withdraw and transport groundwater within its service area for the benefit of landowners within its service area, and the landowners are entitled to use the groundwater delivered, provided claims of landowners to irrigation grandfathered rights or type 1 or 2 non-irrigation grand-

fathered rights shall be subject to the provisions of article 5 of this chapter.

(b) If legally withdrawing and transporting groundwater from outside its service area for use within its service area as of the date of designation of the active management area, to continue to withdraw and transport the amount of groundwater legally being withdrawn as of the date of the designation of the active management area.

2. An irrigation district which was not engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area shall be limited to the right, subject to § 45-496, to:

(a) Contract for surface water and deliver and distribute such water within its service area for irrigation purposes.

(b) Contract to purchase, deliver and distribute effluent within its service area for irrigation purposes.

(c) Withdraw, deliver and distribute within its service area the amount of groundwater allowed by the current irrigation water duty of each member farm multiplied by the water duty acres in that farm, less any portion of such amount withdrawn by individual members.

(d) Continue but not expand any non-irrigation water service being lawfully provided as of the date of the designation of the active management area, except as provided in § 45-497, subsection B.

§ 45-496. Applicability of general transportation provisions and conservation requirements

Withdrawals and transportation of groundwater by an irrigation district pursuant to this article are subject to:

1. The provisions of article 8 of this chapter[1] relating to transportation of groundwater.

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[1] Section 45-541 et seq.

2. Conservation requirements developed by the director pursuant to article 9 of this chapter.[2]

[2] Section 45-561 et seq.

§ 45-497. Withdrawal of groundwater by irrigation districts for municipal or industrial purposes

A. This article shall not be construed to enlarge the authority of an irrigation district to withdraw and distribute groundwater for municipal or industrial purposes.

B. An industrial user may not obtain groundwater delivery service from an irrigation district in excess of the amount it was entitled to receive on the date of the designation of the active management area unless the industrial user has acquired a grandfathered right or has obtained a general industrial use permit pursuant to § 45-515. An industrial user that has been issued a general industrial use permit pursuant to § 45-515 may, at any time, elect to receive groundwater from an irrigation district in the amount specified in the permit if:

1. The director approves the delivery to such groundwater.

2. The irrigation district agrees to deliver such groundwater.

3. The industrial use is located within the exterior boundaries of the service area of the irrigation district.

4. The terms of the permit are modified pursuant to § 45-525.

§ 45-498. Maps of service areas

A. Each city, town, private water company and irrigation district in an active management area shall maintain a current map clearly delineating its service area and distribution system in the director's office and shall furnish such other related data as the director may require. In addition:

1. Each city and town shall maintain a current map of its service area and distribution system in its city or town clerk's office.

2. Each private water company and irrigation district shall maintain a current map of its service area and distribution system in its offices.

B. All maps required by this section shall be available for examination by the public at reasonable times.

ARTICLE 7.
GROUNDWATER WITHDRAWAL PERMITS

§ 45-511. Definitions

In this article, unless the context otherwise requires:

1. "General industrial use" means a non-irrigation use of groundwater except those subject to permits issued pursuant to §§ 45-513 and 45-514 and those for which a certificate of assured water supply is required pursuant to § 45-576. General industrial use includes animal industry use.

2. "Permit" means a permit to withdraw groundwater which is issued by the director pursuant to this article.

§ 45-512. Categories of groundwater withdrawal permits

Except as provided in § 45-452, subsection H and article 5 and 6 of this chapter, a person may not withdraw groundwater from a nonexempt well in an active management area unless the person obtains a groundwater withdrawal permit from the director pursuant to this article. The categories of groundwater withdrawal permits are as follows:

1. Dewatering permits issued pursuant to § 45-513.

2. Mineral extraction and metallurgical processing permits issued pursuant to § 45-514.

3. General industrial use permits issued pursuant to § 45-515.

4. Poor quality groundwater permits issued pursuant to § 45-516.

5. Temporary permits issued pursuant to §§ 45-517 and 45-518.

6. Drainage water permits issued pursuant to § 45-519.

§ 45-513. Dewatering permit; priorities for use of groundwater; conditions on director; duration of permit

A. A person who is engaged in or proposes to engage in the extraction and processing of minerals shall be issued a dewatering permit for the beneficial use of the land for mineral extraction, metallurgical processing and for compliance with applicable environmental controls. For purposes of this section, "dewatering" means the withdrawal of groundwater from pits, from in, under and around ore bodies in proximity to pits and from underground workings. Dewatering does not include process water and tailing water recovered from or pumped from beneath tailing ponds, and a permit is not required therefore if such water is recycled into the extraction or metallurgical process.

B. Groundwater withdrawn pursuant to a dewatering permit shall be used in the following order of priority:

1. To meet mineral extraction, metallurgical processing and environmental control requirements of the permittee.

2. To a city, town, private water company or farm and any other person whose respective ability to withdraw groundwater has been adversely affected by a dewatering permit. Such water shall be equitably allocated by the director without costs but subject to the conditions set forth in subsection C of this section among such persons adversely affected by such dewatering. A person who receives an allocation of water under this paragraph shall reduce his

groundwater withdrawals by the amount of water he receives under this paragraph. A person receiving water under this paragraph does not thereby forfeit or abandon his right to withdraw groundwater.

3. For municipal, commercial, domestic and industrial needs of communities and residential areas directly related to the mineral extraction and metallurgical processing operation of the permittee.

4. To irrigate land owned or controlled by the permittee which is entitled to the use of groundwater for irrigation.

5. To the director for such distribution as will best achieve the goals and purposes of the management plan for the active management area.

6. For such other legal purpose as the permittee elects.

C. Groundwater made available to the director for distribution or allocation under this section is subject to the following conditions:

1. The permittee shall deliver the groundwater to the boundary of his property but shall not be obligated to deliver it further.

2. The permittee shall not be required to treat the chemical quality of the groundwater for distribution or allocation.

3. The permittee shall not be required to make the groundwater available if dewatering ceases, or if all or any portion of the groundwater is needed for a purpose having a higher priority as specified in subsection B of this section.

4. The person actually using the groundwater distributed or allocated by the director shall be responsible for paying any withdrawal fees required under § 45-611.

5. If the director sells water, proceeds shall be applied as follows:

(a) To cover costs, if any, of the director in delivering water to other users.

(b) To cover the permittee's cost in transporting water to the boundary of his property.

(c) To the active management area for general purposes as determined by the director.

D. A permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

§ 45-514. Mineral extraction and metallurgical processing permit; conditions for issuance; duration of permit

A. A person who is engaged in or proposes to engage in the extraction and processing of minerals shall be issued a permit to withdraw groundwater in the required amount, if all of the following apply:

1. The amount of groundwater available for mineral extraction, metallurgical processing and compliance with applicable environmental controls under a dewatering permit is insufficient.

2. Uncommitted municipal and industrial central Arizona project water is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost which does not exceed the current municipal and industrial central Arizona project delivery rates.

3. Other surface water of adequate quality or effluent of adequate quality is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost, including treatment costs, which does not exceed by twenty-five per cent the cost the operator would otherwise incur in withdrawing groundwater.

B. A permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

C. If, during the duration of a mineral extraction and metallurgical processing permit, the director determines

that uncommitted municipal and industrial central Arizona project water is available or surface water of adequate quality or effluent of adequate quality is available to the permittee at a cost comparable to groundwater, the director may require the permittee to use such water in lieu of groundwater.

§ 45-515. General industrial use permits; conditions for issuance; duration of permit

A. The director shall issue a permit to withdraw groundwater from a point outside of the exterior boundaries of the service area of a city, town or private water company for a general industrial use outside of the exterior boundaries of such service area if the director determines that all of the following apply:

1. Uncommitted municipal and industrial central Arizona project water is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost which does not exceed the current municipal and industrial central Arizona project rates.

2. Other surface water of adequate quality or effluent of adequate quality is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost, including treatment costs, which does not exceed by twenty-five per cent the cost the operator would otherwise incur in withdrawing groundwater.

3. Irrigation grandfathered rights are not available for purchase at a reasonable price or cannot be acquired by eminent domain.

4. The intended general industrial use, if located within three miles of the exterior boundaries of the service area of a city, town or private water company, has been denied service by the city, town or private water company at the customary rate in the customary manner. The requirement

of this paragraph does not apply to an expanded animal industry use.

5. The management plan for the active management area can be adjusted to accommodate the intended general industrial use consistent with the achievement of the overall management goal of the active management area.

6. There is an assured water supply for the intended use at the intended point of withdrawal. For purposes of this section, "assured water supply" means sufficient groundwater of adequate quality will be available to the applicant to satisfy the projected general industrial use for the duration of the pejmit.

B. A permit issued pursuant to this section shall e granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

C. If, during the life of the permit, the director determines that uncommitted municipal and industrial central Arizona project water is available or other water or effluent of adequate quality is available at a cost comparable to groundwater, the director may require the permittee to use such water in lieu of groundwater.

§ 45-516. Poor quality groundwater withdrawal permit; conditions for issuance; duration of permit

A. The director may issue a permit to a non-irrigation user to withdraw poor quality groundwater if he determines that the groundwater to be withdrawn because of its quality has no other beneficial use at the present time and that the withdrawal of such groundwater is consistent with the management plan.

B. A permit issued pursuant to this section may be issued for a period of up to thirty-five years, subject to subsection C. The director shall determine the duration of the permit

on the basis of the estimated life of the source of poor quality groundwater.

C. The director shall monitor withdrawals of groundwater pursuant to poor quality groundwater withdrawal permit and shall terminate the permit if the conditions specified in subsection A no longer apply.

§ 45-517. Temporary permit for electrical energy generation; conditions for issuance

A. The director shall, upon an adequate showing that an emergency exists, issue a temporary permit to a person engaged in the generation of electrical energy to withdraw groundwater in excess of the amount of groundwater the person is legally entitled to withdraw under a grandfathered right or other groundwater withdrawal permit.

B. A person may withdraw groundwater in excess of the amount he is legally entitled to withdraw before a permit is issued pursuant to this section. Such person, as soon as reasonably practicable after such withdrawals of groundwater commence, shall submit evidence to the director that an emergency exists.

C. The director shall monitor withdrawals of groundwater pursuant to a temporary permit and shall terminate the permit when the emergency ends.

§ 45-518. Temporary dewatering permit; conditions for issuance; duration of permit

A. The director may issue a temporary permit to a person to withdraw groundwater for dewatering purposes if the director determines that:

1. Dewatering is necessary for the beneficial use of the land from which the groundwater is proposed to be withdrawn.

2. Dewatering is consistent within the management plan for the active management area.

B. A permit issued pursuant to this section may be issued for a period of up to one year, subject to subsection C.

C. The director shall monitor withdrawals of groundwater pursuant to a temporary dewatering permit and shall terminate the permit if the conditions specified in subsection A no longer apply.

§ 45-519. Drainage water withdrawal permit; conditions for issuance

A. The director may issue a permit to a person to withdraw groundwater for drainage purposes if he determines that drainage of irrigated lands is necessary for a reasonable economic return from agricultural production in respect to those lands and the withdrawal of such groundwater is consistent with the management plan for an active management area.

B. The director shall monitor withdrawals of groundwater pursuant to a drainage permit and shall terminate the permit if the conditions for issuance specified in subsection A no longer apply. A permit issued pursuant to this section may be renewed subject to the same criteria used in granting the original permit.

§ 45-520. Point of withdrawal; location of use; conveyance

A. A person who withdraws groundwater under a permit issued pursuant to this article may change his point or points of withdrawal only pursuant to §§ 45-597 and 45-598 and may change his location of use only with the approval of the director and by applying for a modification of the permit pursuant to § 45-527.

B. A temporary permit issued pursuant to §§ 45-517 or 45-518 may not be conveyed. All other permits issued pursuant to this article may be conveyed only for the same use, subject to the approval of the director.

§ 45-521. Permit application form; filing; contents

Application for a permit to withdraw groundwater pursuant to this article shall be made on a form provided by the director which shall include the following information:

1. The name and mailing address of the applicant.

2. The name of the active management area and subbasin, if any, in which the applicant proposes to withdraw groundwater.

3. The name and mailing address of the owner of the land from which the applicant proposes with withdraw groundwater.

4. The legal description of the land on which the applicant proposes to use groundwater and the name and mailing address of the owner of such land.

5. The category of permit for which application is made.

6. The specific purposes for which the groundwater will be withdrawn.

7. The annual amount of groundwater, in acre-feet, for which application is made.

8. If the applicant proposes to withdraw groundwater from an existing well or wells, the location of each such well and the depth and diameter of each well and such other information the director requires.

9. If the applicant proposes to withdraw groundwater from a new well or wells, the proposed location of each such well and the depth and diameter proposed for each well and such other information the director requires.

10. If application is made for a dewatering permit pursuant to § 45-513:

(a) The estimated amount of groundwater necessary to meet mineral extraction and metallurgical processing requirements of the applicant.

(b) The estimated amount of groundwater necessary for municipal and industrial needs of communities and residential areas directly related to the mineral extraction and metallurgical processing operation of the applicant.

(c) The legal description of the acres of land owned or controlled by the applicant entitled to the use of groundwater for irrigation.

11. If application is made for a mineral extraction and metallurgical processing permit pursuant to § 45-514:

(a) The amount of groundwater available to the applicant under a dewatering permit previously obtained by the applicant.

(b) The estimated cost the applicant would incur in withdrawing groundwater at a point where his wellhead or distribution system would otherwise be.

12. If application is made for a general industrial use permit pursuant to § 45-515:

(a) The estimated cost the applicant would incur in withdrawing groundwater at the point where his wellhead or distribution system would otherwise be.

(b) Proof of denial of service or inaction on a service request by a city, town or private water company if the location of the applicant's intended use is within three miles of the exterior boundaries of the service area of such city, town or private water company. Such evidence is not required for an expanded animal industry use.

(c) Studies satisfactory to the director of the probable hydrologic impact on the groundwater resources which the applicant proposes to use including evidence of the availability of an assured water supply for the intended use.

13. If application is made for a temporary dewatering permit pursuant to § 45-518, evidence demonstrating that a temporary dewatering permit is necessary for beneficial use of the land from which the groundwater is proposed to be withdrawn.

14. If application is made for a drainage water permit pursuant to § 45-519:

(a) Evidence that drainage of the applicant's irrigated lands is necessary for a reasonable economic return from agricultural production on such lands.

(b) The legal description of the acres of land owned or controlled by the applicant entitled to the use of groundwater for irrigation.

15. A sworn statement that the information contained in the application is true and correct to the best belief and knowledge of the applicant.

16. Any other information which the director may require.

§ 45-522. Correction of application

Upon receipt of an application, the director shall endorse on the application the date of its receipt and keep a record of the application. If the director determines the application is incorrect or incomplete, the director shall return the application specifically stating the reasons for its return. A record shall be made of any application returned. The applicant may reapply and the reapplication shall be treated as a new application.

§ 45-523. Notice; objections; hearing

A. When the permit application is determined complete and correct, the director shall, within thirty days of such

determination, give notice of the application once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in which the active management area in which the applicant proposes to withdraw groundwater is located.

B. Notice pursuant to subsection A of this section shall state that objections to the issuance of the permit may be filed, by persons residing in the active management area, in writing, with the director within thirty days after the last publication of notice and that objections are limited to whether the permit application meets the criteria for issuance of a permit as set forth in this article. An objection shall state the name and mailing address of the objector, be signed by the objector, his agent or attorney and clearly set forth reasons why the permit should not be issued.

C. In appropriate cases, including cases where a proper written objection to the permit application has been filed, the director may hold a hearing on the application. The director shall, thirty days prior to the date of the hearing, give notice in the manner described in subsection A of this section. The hearing shall be scheduled for not less than sixty days nor more than ninety days after the expiration of the time in which to file objections. A hearing shall be conducted as provided in § 45-480, subsection B.

§ 45-524. Approval or rejection of permit application

A. The approval or rejection of an application for a permit shall be endorsed on the application and dated. If the permit is denied, the director shall return the application to the applicant specifically stating the reasons for denial.

B. A permit issued by the director shall contain the following information.

1. The name and mailing address of the person to whom the permit is issued.

2. The name of the active management area and subbasin in which the groundwater may be withdrawn.

3. The category of permit issued.

4. The specific purpose for which the permit is issued.

5. The point or points of withdrawal of groundwater pursuant to the permit.

6. The legal description of the land on which the groundwater may be used.

7. The total annual amount of groundwater that may be withdrawn.

8. If groundwater is to be withdrawn from a new well or wells, the depth, diameter and general specifications for each such well.

9. The duration of the permit.

10. Conditions on the permit authorized by this chapter or rules or regulations adopted pursuant to this chapter and such other information as the director may determine.

§ 45-525. Registry of permits; reporting

A. The director shall establish and maintain a registry of permits for each active management area. The registry shall include a copy of each permit in the active management area and such other pertinent information as the director determines is necessary.

B. A person to whom a permit is issued shall notify the director of a change in name or mailing address, a change in point of withdrawal or a conveyance of a permit pursuant to § 45-520. A person to whom a permit is conveyed shall notify the director of the conveyance and shall furnish information as required by the director to keep the registry current and accurate. The director shall have continuing jurisdiction and shall issue revised permits as necessary.

C. The director may require holders of permits to file additional information with the annual report required by § 45-632 as necessary to keep the registry current and accurate. For purposes of this article, "holder" means a person

to whom a permit is issued or a person to whom a permit is conveyed.

§ 45-526. Appeals

A person whose application is denied or a person who contested a permit by filing a proper objection pursuant to § 45-523 may appeal the decision as provided in § 45-405.

§ 45-527. Modification of permit

A permittee may seek modification of an unexpired groundwater withdrawal permit and renewal of a permit within six months prior to the date of the expiration of the permit. All permit modifications or renewal applications shall be treated in the same manner as the initial permit application and are subject to the same criteria used in issuing the initial permit.

§ 45-528. Revocation of permits

A. After a hearing in the manner provided in § 45-480, subsection B, the director may permanently, or temporarily, in whole or in part, revoke a groundwater withdrawal permit for any of the following reasons:

1. For a material false statement in an application to initiate, modify or renew a permit, or for a material false statement in any report required to be filed by a person withdrawing or using groundwater pursuant to the provisions of this chapter.

2. For violation of the terms of the permit.

3. For failure to exercise a permit for five or more consecutive years.

B. The director may revoke a groundwater withdrawal permit with the written consent of the permittee and in such case a hearing is not required.

ARTICLE 8. TRANSPORTATION OF GROUNDWATER

§ 45-541. Transportation within a sub-basin

A. Groundwater which is withdrawn pursuant to a grandfathered right or a groundwater withdrawal permit may be transported without payment of damages within a sub-basin of an active management area, subject to the limitations on location of use in §§ 45-472 and 45-473.

B. Groundwater which is withdrawn by a city, town or private water company within its service area may be transported without payment of damages within its service area within a sub-basin of an active management area.

C. Groundwater which is withdrawn by a city or town within its service area may be transported pursuant to a delivery contract authorized by § 45-492, subsection C, without payment of damages, within a sub-basin of an active management area.

D. Groundwater which is withdrawn by an irrigation district within its service area may be transported without payment of damages within its service area within a sub-basin of an active management area.

§ 45-542. Transportation between sub-basins or away from an active management area; irrigation grandfathered right, type 1 non-irrigation grandfathered right

A. Groundwater which is withdrawn pursuant to an irrigation grandfathered right may be transported between sub-basins of an active management area or away from an active management area, subject to the limitations on location of use in § 45-472.

B. Groundwater which is withdrawn pursuant to a type 1 non-irrigation grandfathered right may be transported between sub-basins of an active management area or away from an active management area, subject to the limitations on location of use in § 45-473.

C. Transportations of groundwater pursuant to this section are not subject to payment of damages if the amount transported does not exceed three acre-feet per acre per year withdrawn from retired irrigated land. Transportations of groundwater pursuant to an irrigation grandfathered right in excess of three acre-feet per acre per year withdrawn from retired irrigated land are subject to payment of damages.

§ 45-543. Transportation between sub-basins or away from an active management area; damages; non-irrigation grandfathered right not associated with retired irrigated land; service area withdrawals; permit

A. Groundwater may be transported between sub-basins of an active management area or away from an active management area, subject to payment of damages, if the groundwater is withdrawn:

1. Pursuant to a type 2 non-irrigation grandfathered right.

2. By a city, town or private water company within its service area and transported within its service area.

3. By an irrigation district within its service area and transported within its service area.

4. Pursuant to a groundwater withdrawal permit.

B. Groundwater which is withdrawn by a city or town within its service area may be transported pursuant to a delivery contract authorized by § 45-492, subsection C between sub-basins of an active management area and shall be subject to payment of damages unless the groundwater is withdrawn pursuant to a type 1 non-irrigation grandfathered right.

§ 45-544. Transportation in areas not subject to active management; damages

In areas outside of active management areas, groundwater may be transported:

1. Within a sub-basin of a groundwater basin or within a groundwater basin, if there are not sub-basins, without payment of damages.

2. Between sub-basins of a groundwater basin or away from a groundwater basin, subject to payment of damages.

§ 45-545. Damage rules applicable to all transportations of groundwater

A. In active management areas and in areas outside of active management areas, in any action to recover damages, neither injury to nor impairment of the water supply of any landowner shall be presumed from the fact of transportation.

B. In determining whether there has been injury and the extent of any injury, the court shall consider all acts of the person transporting groundwater toward the mitigation of injury including:

1. Retirement of land from irrigation.

2. Discontinuance of other preexisting uses of groundwater.

3. Water conservation techniques.

4. Procurement of additionl sources of water which benefit the active management area, sub-basin or landowners within the active management area or sub-basin.

C. The court may award reasonable attorney fees, expert witness expenses and fees and court costs to the prevailing party.

ARTICLE 9. MANAGEMENT

§ 45-561. Definitions

In this article, unless the context otherwise requires:

1. "Augmentation" means to supplement the water supply of an active management area and may include the importation of water into the active management area, storage of water or artificial groundwater recharge.

2. "Industrial use" means a non-irrigation use of water not supplied by a city, town or private water company, including animal industry use and expanded animal industry use.

3. "Intermediate water duty" means an irrigation water duty, as defined in § 45-402, which is established by the director during a management period to apply for a specific number of years during the management period.

4. "Management period" means a period of years prescribed by §§ 45-564 through 45-568 during which a prescribed management plan applies.

5. "Municipal use" means all non-irrigation uses of water supplied by a city, town, private water company or irrigation district.

6. "Safe-yield" means a groundwater management goal which attempts to achieve and thereafter maintain a long-term balance between the annual amount of groundwater withdrawn in an active management area and the annual amount of natural and artificial groundwater recharge in the active management area.

§ 45-562. Management goals for initial active management areas

A. The management goal of the Tucson, Phoenix and Prescott active management areas is safe-yield by January 1, 2025, or such earlier date as may be determined by the director.

B. The management goal of the Pinal active management area is to allow development of non-irrigation uses as provided in this chapter and to preserve existing agricultural economies in the active management area for as long as feasible, consistent with the necessity to preserve future water supplies for non-irrigation uses.

C. All initial active management areas are subject to all provisions of this chapter.

§ 45-563. Management plans in initial active management areas; management periods; general provisions

The director shall develop a management plan for each initial active management area for each of five management periods pursuant to the guidelines prescribed in §§ 45-564 through 45-568 and shall adopt the plans only after public hearings pursuant to §§ 45-570 and 45-571. The plans shall include a continuing mandatory conservation program for all persons withdrawing, distributing or receiving groundwater designed to achieve reductions in withdrawals of groundwater.

§ 45-564. Management plan for first management period; guidelines

A. For the first management period, 1980 to 1990, the director shall promulgate management plans for the Phoenix, Tucson and Prescott active management areas not later than January 1, 1983 and for the Pinal active management area not later than July 1, 1985. In each plan, the director shall establish:

1. An irrigation water duty for each farm unit in the active management area. The irrigation water duty shall be calculated as the quantity of water reasonably required to irrigate the crops historically grown in a farm unit and shall assume conservation methods being used in the state which would be reasonable for the farm unit including lined ditches, pump-back systems, land leveling and efficient application practices, but not including a change from flood irrigation to drip irrigation or sprinkler irrigation.

2. A conservation program for all non-irrigation uses of groundwater. For municipal uses, the program shall require reasonable reductions in per capita use and such other conservation measures as may be appropriate for individual users. For industrial uses including industrial uses within the exterior boundaries of the service area of a city, town, private water company or irrigation district, the

program shall require use of the latest commercially available conservation technology consistent with reasonable economic return.

3. Economically reasonable conservation requirements for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas.

B. Within thirty days after the management plan for the first management period is adopted, the director shall give written notice of:

1. The irrigation water duty for the farm unit to each person in the farm unit who is entitled to withdraw or receive groundwater pursuant to an irrigation grandfathered right and to each person distributing groundwater pursuant to an irrigation grandfathered right.

2. The municipal conservation requirements included in the management plan for reductions in per capita use and for the use of appropriate conservation measures by individual users to each person who is entitled to withdraw or distribute groundwater for municipal use in the active management area.

3. The industrial conservation requirements included in the management plan for each person who is entitled to withdraw or receive groundwater for an industrial use in the active management area.

4. The conservation requirements included in the management plan for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas to each city, town, private water company and irrigation district in the active management area.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements within two years from the date of the notice, unless a person obtains a variance pursuant to § 45-574.

§ 45-565. Management plan for second management period; guidelines

A. For the second management period, 1990 to 2000, the director shall promulgate a management plan for each initial active management area not later than January 1, 1988. In each plan the director shall:

1. Establish a new irrigation water duty for each farm unit to be reached by the end of the second management period and may establish one or more intermediate water duties to be reached at specified intervals during the second management period. The irrigation water duty and any intermediate water duties shall be calculated as the quantity of water reasonably required to irrigate the crops historically grown in the farm unit and shall assume the maximum conservation consistent with prudent long-term farm management practices within areas of similar farming conditions, considering the time required to amortize conservation investments and financing costs.

2. Establish additional conservation requirements for all non-irrigation uses of groundwater and a schedule for compliance with those requirements. For municipal uses, the program shall require additional reasonable reductions in per capital use to those required in the first management period and use of such other conservation measures as may be appropriate for individual users. For industrial uses including industrial uses within the exterior boundaries of the service area of a city, town, private water company or irrigation district, the program shall require use of the latest commerically available conservation technology consistent with reasonable economic return.

3. Establish additional economically reasonable conservation requirements for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas.

4. Include a program for augmentation of the water supply of the active management area including incentives for

articificial groundwater recharge.

5. In cooperation with the department of health services, include an assessment of groundwater quality in the active management area and any proposed program for groundwater quality protection. Any such program shall be submitted to the legislature for any ncessary enabling legislation or coordination with existing programs of the department of health services.

B. Within thirty days after the management plan for the second management period is adopted, the director shall give written notice in the manner and to the persons prescribed in § 45-564, subsection B.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements for the second management period not later than January 1, 2000, unless the person obtains a variance pursuant to § 45-574. If an intermediate water duty has been established, a person who is entitled to withdraw or receive groundwater pursuant to an irrigation grandfathered right shall comply with the intermediate water duty not later than the compliance date specified in the management plan, unless the person obtains a variance pursuant to § 45-574.

§ 45-566. Management plan for third management period; guidelines

A. For the third management period, 2000 to 2010, the director shall promulgate a management plan for each initial active management area not later than January 1, 1998. In each plan the director:

1. Shall establish a new irrigation water duty for each farm unit to be reached by the end of the third management period and may establish one or more intermediate water duties to be reached at specified intervals during the third management period. The irrigation water duty or intermediate water duties for the third management period shall be

calculated as the quantity of water reasonably required to irrigate the crops historically grown in the farm unit and shall assume the maximum conservation consistent with prudent long-term farm management practices within areas of similar farming conditions, considering the time required to amortize conservation investments and financing costs. In setting the irrigation water duty or intermediate twenty-five per cent of the water duties within the sub-basin to more clearly reflect the average of the middle fifty per cent of the water duties within the sub-basin.

2. Shall establish additional conservation requirements for all non-irrigation uses of groundwater and a schedule for compliance with those requirements. For municipal uses, the program shall require additional reasonable reductions in per capita use to those required in the second management period and use of such other conservation measures as may be appropriate for individual users. For industrial uses including industrial uses within the exterior boundaries of the service area of a city, town, private water company or irrigation district, the program shall require use of the latest commercially available conservation technology consistent with reasonable economic return.

3. Shall establish additional economically reasonable conservation requirements for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas.

4. Shall include a program for additional augmentation of the water supply of the active management area, if feasible, including incentives for artificial groundwater recharge.

5. Shall, in cooperation with the department of health services, include an assessment of groundwater quality in the active management area and any proposed program for groundwater quality protection. Any such program shall be submitted to the legislature for any necessary enabling legislation or coordination with existing programs of the department of health services.

6. May include a program for the purchase and retirement of grandfathered rights by the department to begin no earlier than January 1, 2006.

B. Within thirty days after the management plan for the third management period is adopted, the director shall give written notice in the manner and to the persons prescribed in § 45-564, subsection B.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements for the third management period not later than January 1, 2010, unless the person obtains a variance pursuant to § 45-574. If an intermediate water duty has been established, a person who is entitled to withdraw or receive groundwater pursuant to an irrigation grandfathered right shall comply with the intermediate water duty not later than the compliance date specified in the management plan unless the person obtains a variance pursuant to § 45-574.

§ 45-567. Management plan for fourth management period; guidelines

A. For the fourth management period, 2010 to 2020, the director shall promulgate a management plan for each initial active management area not later than January 1, 2008. The plans may include, where feasible:

1. A new irrigation water duty or intermediate water duties.

2. Additional conservation requirements for non-irrigation uses and a schedule for compliance with those requirements.

3. Additional economically reasonable conservation requirements for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas.

4. A program for additional augmentation of the water

supply of the active management area including incentives for artififical groundwater recharge.

5. In cooperation with the department of health services, an assessment of groundwater quality in the active management area and any proposed program for groundwater quality protection. Any such program shall be submitted to the legislature for any necessary enabling legislation or coordination with existing programs of the department of health services.

6. A program for purchase and retirement of grandfathered rights by the department.

B. Within thirty days after the management plan for the fourth management period is adopted, the director shall give written notice in the manner and to the persons prescribed in § 45-564, subsection B.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements for the fourth management period not later than January 1, 2020, unless the person obtains a variance pursuant to § 45-574. If intermediate water duties have been established, a person who is entitled to withdraw or receive groundwater pursuant to an irrigation grandfathered right shall comply with those water duties as of the date specified for compliance in the management plan, unless the person obtains a variance pursuant to § 45-574.

§ 45-568. Management plan for fifth management period; guidelines

A. For the fifth management period, 2020 to 2025, the director shall promulgate a management plan for each initial active management area not later than January 1, 2019 pursuant to the guidelines prescribed in § 45-567, subsection A.

B. Within thirty days after the management plans for the fifth management period is adopted, the director shall give written notice in the manner and to the persons prescribed in § 45-564, subsection B.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements for the fifth management period not later than January 1, 2025.

§ 45-569. Management goals and management plans for subsequent active management areas

A. Within thirty days of the designation of a subsequent active management area pursuant to article 2 of this chapter[1], the director shall establish a management goal for the active management area and the number of years in which the goal is to be achieved.

B. Not later than two years after the designation of a subsequent active management area, the director shall promulgate an initial management plan for the active management area and may provide for subsequent management plans to be promulgated during the time set for achieving the management goal. If the director determines that active management is necessary to preserve the existing supply of groundwater for future needs or that land subsidence or fissuring is endangering property or potential groundwater storage capacity, the director, in developing the plan or plans, shall include measures for reducing groundwater withdrawals which follow as closely as practicable the program set forth in §§ 45-564 through 45-568. If the director determines that active management is necessary because the use of groundwater is resulting in actual or threatened groundwater quality degradation, the director shall, in cooperation with the department of health services, include in the plan or plans a program for prevention or amelioration of groundwater quality problems and a schedule for implementation of the proposed solutions. The director

shall submit such program to the legislature for any necessary enabling legislation or coordination with existing programs of the department of health services.

C. All management plans, including the management goal, for a subsequent active management area, shall be adopted only after public hearings pursuant to §§ 45-570 and 45-571.

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[1] Section 45-411 et seq.

§ 45-570. Hearing on management plans; notice; procedures

A. The director shall hold a public hearing on each proposed management plan in each active management area prior to final adoption of the management plan.

B. The director shall give notice of the hearing within thirty days after the proposed managment plan is completed. The notice shall include a summary of the management plan, a map or a description of the boundaries of the active management area, and the time and place of the hearing. The notice shall be published once each week for two consecutive weeks in a newspaper of general circulation in each county in which the active management area is located.

C. The hearing shall be held at a location within the active management area as soon as practicable but no less than thirty days and no more than sixty days after the first publication of the notice of the hearing.

D. At the hearing, the director shall present data in support of the adoption of the proposed management plan. Any person may appear at the hearing either in person or by representative and submit oral or documentary evidence for or against the adoption of the management plan.

§ 45-571. Findings upon hearing; order for adoption of management plan; publication

A. Within thirty days after the hearing, the director

shall make and file in the department a written summary and findings with respect to matters considered during the hearing.

B. If in the findings the director decides to adopt the management plan, he shall make and file an order adopting the plan pursuant to the findings. If the director determines that modifications in the management plan are necessary, he shall make such modifications and make and file an order adopting the modified plan and include his reasons for the modifications.

C. A summary of the management plan, findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing, and the order is effective when published for the final time. The factual data compiled by the director, a transscript of the hearing, a copy of the findings and a copy of the management plan are public records of the department and shall be available for examination by the public during regular business hours.

§ 45-572. Modification of conservation program; notice

A. After a management plan is adopted, the director may modify the plan after public hearing pursuant to §§ 45-570 and 45-571, except that the director may modify an irrigation water duty or conservation requirement only if the director determines that extraordinary circumstances justify the modification.

B. Within thirty days after a modification of an irrigation water duty or conservation requirement is adopted, the director shall give written notice of the modification in the manner and to the persons prescribed in § 45-564, subsection B. Any aggrieved person may request an administrative review pursuant to § 45-575.

C. All persons notified pursuant to subsection B of this section shall comply with the modified irrigation water duty or modified conservation requirements not later than

the compliance date specified in the modification notice, unless the person obtains a variance pursuant to § 45-574.

§ 45-573. Water quality considerations; consultation with department of health services

The director shall consult with the department of health services on water quality considerations in developing and implementating management plans under this article.

§ 45-574. Variances; application; notice; hearing; issuance

A. A person who requires additional time to comply with an irrigation water duty or conservation requirement may apply to the director for a variance from the water duty or requirement within ninety days from the date of notice of the water duty or requirement. The application shall include the following:

1. The name and mailing address of the applicant.

2. The name of the active management area in which the use is located.

3. The amount of groundwater currently being withdrawn annually by the person.

4. The irrigation water duty or conservation requirement from which the variance is sought.

5. A general description of the economic circumstances preventing timely compliance with the irrigation water duty or conservation requirement and any information relevant to such circumstances.

6. The sworn statement that the information contained in the application is true and correct to the best belief and knowledge of the applicant.

7. Such other information as the director may require.

B. Upon receipt and filing of the application, the director shall, within thirty days of the filing, give written notice to the applicant by certified mail of the hearing on

the application. A hearing shall be conducted as provided in § 45-480, subsection B.

C. The director may grant a variance upon a showing of compelling economic circumstances.. The variance shall specify:

1. The amount of groundwater which may be withdrawn by the person during the variance period, or a schedule of intermediate water duties or conservation requirements to be reached at specified intervals during the variance period.

2. The duration of the variance, which may not exceed five years from the date of the director's final determination of the variance.

D. A party aggrieved by the director's decision may appeal the final determination of the director within thirty days to the superior court in the county in which the irrigated land or non-irrigation use is located pursuant to § 45-405.

§ 45-575. Administrative review of irrigation water duty and conservation requirements

A. Any aggrieved party may request an administrative review of the irrigation water duty or any conservation requirement not later than ninety days from the date of notice of such duty or requirement.

B. A hearing shall be conducted as provided in § 45-480, subsection B. At least thirty days prior to the hearing, the director shall give written notice to the aggrieved party by certified mail of the time and place for the hearing.

C. A party aggrieved by the director's decision may appeal to the superior court in the county in which the irrigated land or the non-irrigation use is located within thirty days of the final decision pursuant to § 45-405.

§ 45-576. Certificate of assured water supply; designated areas; exemptions

A. A person who proposes to offer subdivided or unsubdivided lands, as these terms are defined in § 32-2101, for sale or lease in an active management area shall apply for and obtain a certificate of assured water supply from the director prior to presenting the plat for approval to the city, town or county in which the land is located, where such is required, and prior to filing with the state real estate commissioner a notice of intention to offer such lands for sale or lease, pursuant to §§ 32-2181 and 32-2195.01, unless the subdivision is located within an area designated as having an assured supply pursuant to subsection D or E of this section.

B. A city, town or county may approve a subdivision plat only if the subdivider has obtained a certificate of assured water supply from the director unless the subdivision is located within an area designated as having an assured water supply pursuant to subsection D or E of this section. The city, town or ocunty shall note on the face of the approved plat that a certificate of assured water supply has been submitted with the plat or that the proposed subdivision is located within an area designated as having an assured supply, pursuant to subsection D or E of this section.

C. The state real estate commissioner may issue a public report authorizing the sale or lease of subdivided or unsubdivided lands only if the subdivider, owner or agent has obtained a certificate of assured water supply from the director, unless the lands are located within an area designated as having an assured water supply pursuant to subsection D or E of this section.

D. The director shall designate service areas of private water companies in active management areas where an assured water supply exists. An allocation for central Arizona project water by the United States secretary of the interior to a private water company is deemed a presumption of an assured water supply upon a finding by the director that the private water company has made an uncondi-

tional offer to enter into a contract for central Arizona project water sufficient to supply the intended use and is proceeding to develop the necessary delivery system and treatment works. The presumption of an assured water supply for a private water company ceases if the private water company refuses to enter into a contract for central Arizona project water during the contract period, as determined by the director. If a city or town acquires a private water company which has contracted for central Arizona project water, the city or town shall assume the private water company's contract for central Arizona project water.

E. The director may designate service areas of private water companies in active management areas where an assured water supply exists before an allocation of central Arizona project water as stated in subsection D of this section, on the written request of a person who proposes to offer for sale or lease subdivided or unsubdivided lands and the private water company that would serve the lands. The director shall determine in his best judgment whether, in addition to other available supplies, sufficient central Arizona project water will be allocated to the private water company to meet the water requirements of all existing development within its franchised area and the requirements of the specific proposed development or developments, taking into account the total request for central Arizona project water from all applicants, the reasonable foreseeability of an allocation by the secretary of the interior as recommended by the director and any need for reserving a portion of the total amount of central Arizona project water requested by all applicants in order to achieve the management goal within the active management area. The determination by the director shall be based upon a finding:

1. That the private water company has made an unconditional offer to enter into a contract for that amount of central Arizona project water determined by the director to be allocable.

2. That the private water company has submitted a plan generally describing the treatment works and facilities for the delivery and treatment of the central Arizona project water and a tentative schedule of major actions which the company will proceed with upon an allocation of central Arizona project water.

3. That the private water company will be able to finance and construct the necessary delivery system and treatment works.

4. If the method of delivery or treatment is by the use of works or facilities of another or by an exchange of water with another, either that there is an existing agreement for the use of the works or facilities or an exchange agreement or that there is a written understanding between the parties of the general terms and criteria for such use or exchange.

F. A determination by the director pursuant to subsection E of this section that a sufficient amount of central Arizona project water can be so allocated is deemed a conditional presumption of an assured water supply for all existing development within its franchised area and the proposed development or developments specified in the director's determination. At the time the secretary of the interior has ordered central Arizona project allocations for private water companies, the director's authority to make determinations which create conditional presumptions of assured water supply terminates. A conditional presumption created under this subsection terminates on the date of an allocation of central Arizona project water by the secretary of the interior to the private water company. Thereafter, the provisions of subsection D of this section apply.

G. The director shall designate service areas of cities and towns in active management areas where an assured water supply exists. If a city or town has received an allocation from the United States secretary of the interior for central Arizona project water, the service area and extensions of the service area of such city or town are deemed to have an

assured water supply. If the city or town refuses to enter into a contract for central Arizona project water during the contract period, as determined by the director, the determination that the city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply within its service area. If a city or town enters into a contract for central Arizona project water, the service area and extensions of the service area of such city or town are deemed to continue to have an assured water supply until December 31, 2000. Commencing on January 1, 2001, the determination that the service area of a city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply within its service area.

H. A map identifying and describing the designated service areas of cities, towns and private water companies where an assured water supply exists shall be on file in the department and shall be available for examination by the public during regular business hours. The director shall notify the mayors of all cities and towns in active management areas and the chairmen of the boards of supervisors of counties in which active management areas are located of the service areas where an assured water supply exists and any modification of such areas within thirty days of the designation or modification. Persons proposing to offer subdivided or unsubdivided lands located within such designated service areas for sale or lease are exempt from applying for and obtaining a certificate of assured water supply.

I. This section does not apply in the case of the sale of lands for developments which are subject to a mineral extraction and processing permit or an industrial use permit pursuant to §§ 45-514 and 45-515.

J. For purposes of this section, "assured water supply" means:

1. Sufficient groundwater or surface water of adequate

quality will be continuously available to satisfy the water needs of the proposed use for at least one hundred years;

2. The projected water use is consistent with the management plan and achievement of the management goal for the active management area; and

3. The financial capability has been demonstrated to construct the delivery system and any treatment works necessary to make the supply of water available for the proposed use.

§ 45-577. Application; hydrological study; review of application

A. The director shall prescribe the form of application for a certificate of assured water supply, to include, as applicable:

1. The legal description of the land.

2. The plats, plans and maps of the proposed development.

3. Information on the nature and magnitude of the proposed development, including the number of parcels, lots or dwelling units and the annual amount of water which will be required.

4. Evidence of contracts for the delivery of water and information relating to the terms of the contracts.

5. If groundwater is a proposed source of water:

(a) Evidence of ownership of any grandfathered rights pursuant to which groundwater may be withdrawn for the proposed development.

(b) The legal description of the location of any existing wells from which the applicant proposes to withdraw groundwater or the proposed location of new wells.

6. Evidence of the right to use surface water pursuant to chapter 1, article 2 of this title[1] pursuant to a judicial decree or pursuant to a right established prior to 1919.

7. Financing arrangements for the development and evidence of financial capability to construct the delivery system and any treatment works necessary to make the supply of water available for the proposed use.

8. A sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

9. Any other information which the director may require.

B. If groundwater is a proposed source of water, the applicant shall submit with the application for a certificate of assured water supply a copy of a hydrological study on the groundwater resources that demonstrates an assured supply for the proposed use. The director shall prescribe the contents of the study which is to be submitted with the application.

C. The director shall review and evaluate the application. The director may request additional information from the applicant and conduct independent investigations as may be necessary to determine whether an assured water supply exists.

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[1] Section 45-131 et seq.

§ 45-578. Notice; objections; hearing; issuance of certificate; appeals

A. When the application for a certificate of assured water supply is determined complete and correct, the director shall, within fourteen days of such determination give notice of the application, once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in which the active management area in which the applicant proposes to withdraw groundwater is located.

B. Notice pursuant to subsection A of this section shall state that objections to the issuance of the certificate may be filed by residents of the active management area, in writing, with the director within ten days after the last publication of notice. An objection shall state the name and mailing address of the objector, be signed by the objector, his agent or attorney and clearly set forth reasons why the certificate should not be issued. The grounds for objection are limited to whether the certificate application meets the criteria for determining an assured water supply set forth in § 45-576, subsection J.

C. In appropriate cases, including cases where a proper written objection to the certificate application has been filed, the director may hold a hearing on the application. The director shall, thirty days prior to the date of the hearing, give notice in the manner described in subsection A of this section. The hearing shall be scheduled for not less than thirty days nor more than sixty days after the expiration of the time in which to file objections. A hearing shall be conducted as provided in § 45-480, subsection B, except that the director shall issue a decision and order either affirming or modifying the hearing officer's determination within four months of the filing of the application.

D. Upon finding that an assured water supply exists for the proposed use, the director shall issue a certificate of assured water supply to the applicant. Upon finding that an assured water supply does not exist, the director shall deny the application and return it to the applicant.

E. An aggrieved party or a person who contested a certificate by filing a proper objection pursuant to subsection B of this section may, within thirty days of the final decision of the director, appeal the decision as provided in § 45-405.

ARTICLE 10. WELLS

§ 45-591. Definitions

In this article, unless the context otherwise requires:

1. "Existing well" means a well which was drilled prior to the effective date of this chapter and which is not abandoned or sealed or a well which was not completed on the effective date of this article[1] but for which a notice of intention to drill was on file with the Arizona water commission on such date.

2. "New well" means a well for which a notice of intention to drill or a permit is required pursuant to this article.

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[1] June 12, 1980.

§ 45-592. Wells in general

A. A person may construct, replace or deepen a well in this state only pursuant to this article. The drilling of a well may not begin until all requirements of this article are met.

B. The director may adopt temporary rules to allow a person to construct, replace or deepen a well prior to the adoption of final rules and regulations pursuant to this article.

§ 45-593. Registration of existing wells; permanent record of all wells

A. The director shall adopt rules and regulations establishing procedures for registration of all existing wells in this state. Within two years of the effective date of this chapter, a person who owns an existing well shall register the well pursuant to the rules and regulations adopted by the director on a registration form provided by the director. The registration form shall include:

1. The registration number of any well previously required to be registered in the state prior to the effective date of this chapter.

2. The legal description of the land upon which the well is located, the location of the well on the land and the name and mailing address of the owner of the land.

3. The depth, diameter and type of casing of the well.

4. Such legal descripton of the land upon which the groundwater is being used as may be required by the director to administer this chapter.

5. The maximum pumping capacity of the well.

6. Any other information which the director may require.

B. The director shall assign a registration number to each well registered pursuant to this section and to all other wells drilled pursuant to this chapter and shall maintain a permanent record of registration numbers and all other information on new and existing wells pursuant to this chapter and previous law.

C. The person to whom a well is registered shall notify the director of a change in ownership of the well, and the new owners shall furnish information as required by the director to keep the department's well registration records current and accurate.

D. This article shall not be construed to legalize any well existing on the effective date of this article which was not in accordance with prior statutory law.

§ 45-594. Well construction standards

The director shall adopt rules and regulations establishing construction standards for new wells and replacement wells and the deepending and abandonment of existing wells. All well construction operations shall comply with the rules and regulations adopted pursuant to this section.

§ 45-595. Well construction requirements; licensing of well drillers and pump installation contractors

A. New well construction, including modifications of wells, shall be performed under the direct and personal

supervision of a well driller who holds a contractor's license pursuant to title 32, chapter 10, article 2[1] and a well driller's license pursuant to subsection B.

B. A person who intends to construct or modify one or more wells in this state and who possesses a contractor's license pursuant to title 32, chapter 10, article 2 shall file an application for a well driller's license with the director. The application shall include:

1. The name, mailing address, place of business and contractor's license number of the applicant.

2. The applicant's experience and qualifications.

3. Such other information as the director may require.

C. The director shall, by rule or regulation, establish qualifications and a reasonable fee of not more than fifty dollars for licenses for well drillers and establish procedures for the evaluation and licensing of applicants. A nontransferable well driller's license shall be issued if the director finds that the applicant meets the qualifications established pursuant to this subsection. The director may revoke a well driller's license for good cause.

D. A person who drills or modifies an exempt well on land owned by that person shall first obtain a single well license from the department. The department shall issue the license to drill the well according to standard small well construction standards. No fee may be charged for a single well license.

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[1] Section 32-1121 et seq.

§ 45-595. Well construction requirements; licensing of well drillers and pump installation contractors

A. New well construction, including modifications of wells, shall be performed under the direct and personal supervision of a well driller who holds a well driller's license pursuant to subsection B.

B. A person who intends to construct or modify one or more wells in this state shall file an application for a well driller's license with the director. The application shall include:

1. The name, mailing address and place of business of the applicant.

2. The applicant's experience and qualifications.

3. Such other information as the director may require.

C. The director shall, by rule or regulation, establish qualifications and a reasonable fee of not more than fifty dollars for licenses for well drillers and establish procedures for the evaluation and licensing of applicants. A nontransferable well driller's license shall be issued if the director finds that the applicant meets the qualifications established pursuant to this subsection. The director may revoke a well driller's license for good cause.

§ 45-596. Notice of intention to drill

A. In an area not subject to active management, a person may not drill or cause to be drilled any well or deepen an existing well without first filing notice of intention to drill pursuant to subsection C.

B. In an active management area, a person may not drill or cause to be drilled an exempt well or a replacement well in approximately the same location or deepen an existing well without first filing notice of intention to drill pursuant to subsection C.

C. A notice of intention to drill shall be filed with the director on a form prescribed and furnished by the director which shall include:

1. The name and mailing address of the person filing the notice.

2. The legal description of the land upon which the well is proposed to be drilled and the name and mailing address of the owner of the land.

3. The legal description of the location of the well on the land.

4. The depth, diameter and type of casing of the proposed well.

5. Such legal description of the land upon which the groundwater is proposed to be used as may be required by the director to administer this chapter.

6. When construction is to begin.

7. The proposed uses to which the groundwater will be applied.

8. The name and well driller's license number of the well driller who is to construct the well.

9. The design pumping capacity of the well.

10. If for a replacement well, the maximum capacity of the original well and the distance of the replacement well from the original well.

11. Such other information as the director may require.

D. Notice of intention to drill shall be filed with the director in duplicate. Upon receiving the notice, the director shall record the notice and endorse the date of receipt and a filing number on the notice. Within fifteen days of the filing, the director shall mail the duplicate copy of the notice to the person giving the notice at the address stated in the notice. Upon receipt of a copy of the notice showing the record of receipt by the director and the filing of the notice, this section is deemed to have been fully complied with in respect to the drilling or deepening of the well described in the notice.

E. The well shall be completed within one year after the date of notice. If the well is not completed within one year, the person shall file a new notice before proceeding with further construction.

§ 45-597. Deepening and replacement of wells in active management areas; filing of notice

A. A person entitled to withdraw groundwater in an active management area may deepen an existing well or construct a replacement well at approximately the same location. The director shall by rule or regulation define what constitutes a replacement well, including the distance from the original well site that is deemed to be the same location for a replacement well.

B. Prior to deepening an existing well or constructing a replacement well at approximately the same location, the person shall file a notice of intention to drill pursuant to § 45-596 and provide the director with any other information as the director may by rules and regulations require.

§ 45-598. New wells and replacement wells in new locations in active management areas; rules and regulations; permit required

A. The director shall adopt rules and regulations governing the location of new wells and replacement wells in new locations in active management areas to prevent unreasonably increasing damage to surrounding land or other water users from the concentration of wells.

B. A person entitled to withdraw groundwater in an active management area pursuant to article 5 or 6 of this chapter[1] may construct a new well or a replacement well in a new location if the location of the new well or the replacement well complies with the rules and regulations adopted by the director pursuant to subsection A and if the person has applied for and received a permit from the director.

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[1] Sections 45-461 et seq., 45-491 et seq.

§ 45-599. Permit application; contents; correction of defective application; issuance of permit

A. An application for a permit to construct a new well

or replacement well in a new location shall be made on a form prescribed and furnished by the director which shall include:

1. The name and mailing address of the applicant.

2. The legal description of the land upon which the new well is proposed to be constructed and the name and mailing address of the owner of the land.

3. The legal description of the proposed location of the new well on the land.

4. If for a replacement well, the legal description of the land upon which the original well is located, the name and mailing address of the owner of the land, the legal description of the location of the original well on the land, the depth and diameter of the original well and evidence of proper abandonment.

5. The depth, diameter and type of casing of the new well.

6. Such legal description of the land upon which the groundwater is proposed to be used as may be required by the director to administer this chapter.

7. When construction is to begin.

8. The proposed use of the groundwater to be withdrawn.

9. The design pumping capacity of the new well.

10. The name and well driller's license number of the well driller who is to construct the well.

11. Such other information including any maps, drawings and data as the director may require.

B. Upon receipt of a permit application, the director shall endorse on the application the date of its receipt. If the application is incorrect or incomplete, it shall be returned for correction or completion, endorsed with the reasons for its return. A record shall be made of all applicatons received and all applications returned.

C. The director shall approve an application for a permit for a new well or a replacement well in a new location if the proposed well complies with the rules and regulations adopted pursuant to § 45-598, subsection A.

D. The director shall record and endorse the approval or rejection of an application for a permit on the application and return a copy of the application to the applicant within fifteen days of receipt of the application. Upon approval, the director shall issue a permit and the applicant may proceed to construct the well. If the application is rejected, the applicant shall not proceed with construction of the well. The well shall be completed within one year of receipt of the permit. If the well is not completed within one year, the applicant shall file a new application before proceeding with construction.

E. The permit shall state the following:

1. The legal description of the land upon which the well may be constructed.

2. The legal description of the location of the new well on the land.

3. The depth and diameter of the well and type of casing.

4. The maximum pumping capacity of the well.

5. The legal description of the land upon which the groundwater will be used.

6. The use of the groundwater to be withdrawn.

§ 45-600. Filing of log by driller; filing of completion report

A. A well driller shall maintain a complete and accurate log of each well he drills. Within thirty days of completion of the drilling of any well in this state, the driller shall file a copy of the log of the well with the director, including information on the casing of the well and the capping applied, if it is an artesian well. The director shall prescribe well driller report forms and the department shall furnish them on request.

B. Within thirty days after the installation of pumping equipment in any well in this state, the driller shall file a completion report with the director. The director shall prescribe the completion report form and the department shall furnish them on request. The completion report form shall include:

1. The type of equipment installed.

2. Tested pumping capacity of the well in gallons per minute as determined for a non-flowing well by measuring the discharge of the pump after continuous operation for at least four hours, or for a flowing well by measuring the natural flow at the land surface.

3. Drawdown of the water level measured in feet for a non-flowing well after not less than four hours of continuous operation and while still in operation, or for a flowing well, the shut-in pressure measured in feet above the land surface or in pounds per square inch at the land surface.

4. Depth in feet from the land surface to the static groundwater level, measured immediately prior to the well-capacity test.

5. Such other information as the director may require.

§ 45-601. Operating regulations for multiple wells

The director may adopt rules and regulations governing pumping patterns of persons who withdraw groundwater from multiple wells in an active management area to minimize damage to adjacent groundwater users. The director may not require a person who withdraws groundwater from multiple wells to change his pumping patterns if the person or user cannot reasonably accommodate such changes.

§ 45-602. Capping of wells; waste

A. Groundwater which has been withdrawn shall not be allowed to waste. To effectuate the purpose of this section, the director shall:

1. Require all flowing wells to be capped or equipped

with valves so that the flow of water can be completely stopped when not in use.

2. Require both flowing and non-flowing wells to be constructed and maintained so as to prevent waste of groundwater through leaky casing, lack of casings, pipes, fittings, valves or pumps, either above or below the surface of the ground.

B. The reasonable withdrawal of groundwater for development, testing or repair of a well or the inadvertent loss of water due to breakage of a pump, valve, pipe or fitting is not waste if reasonable diligence is shown in effecting the necessary repairs.

§ 45-603. Criteria for rules and regulations

In developing rules and regulations under this article, the director shall consider, among other things, water quality, cones of depression and land subsidence.

§ 45-604. Water measuring devices

A. A person who withdraws groundwater from a non-exempt well in an active management area or an irrigation non-expansion area shall use a water measuring device approved by the director.

B. The director shall adopt rules and reuglations setting forth the requirements and specifications for water measuring devices.

ARTICLE II. FINANCIAL PROVISIONS

§ 45-611. Groundwater withdrawal fee; amounts and purposes of fee

The director shall levy and collect an annual groundwater withdrawal fee from each person withdrawing groundwater in an active management area in an amount not to exceed five dollars per acre-foot of groundwater withdrawn and

beneficially used. The actual amount of the fee shall be set by the director as follows:

1. For administration and enforcement of this chapter, an amount not less than fifty cents and not greater than one dollar per acre-foot per year. The initial fee for administration and enforcement shall be levied as soon as practicable after the effective date of this article.

2. For augmentation of the water supply of the active management area, an amount not greater than two dollars per acre-foot per year. The initial fee for augmentation shall be levied in the first year in which the director develops and implements an augmentation program as part of the management plan of the active management area.

3. For purchasing and retiring grandfathered rights, an amount not greater than two dollars per acre-foot per year. The initial fee for purchasing and retiring grandfathered rights shall be levied in the first year in which the director develops and implements a program for the purchase and retirement of grandfathered rights as part of the management plan for the active management area, but not earlier than January 1, 2006.

§ 45-612. Administration and enforcement withdrawal fee; exemption from lapsing; disposition of excess monies

A. Each year the legislature shall appropriate sufficient funds to the department to cover all costs of administration and enforcement of this chapter.

B. Not later than October 1 of each year, the director shall estimate the total amount of groundwater withdrawn in all active management areas during the following calendar year and set the administration and enforcement fee pursuant to § 45-611, paragraph 1 to produce an amount equal to one-half of the amount budgeted by the director for administration and enforcement purposes for the following fiscal year. In setting the administration and en-

forcement fee, the director shall account for excess payments or deficiencies in payments in the past fiscal year. Monies collected from administration and enforcement fees shall be deposited in the general fund.

C. Monies budgeted for administration and enforcement purposes pursuant to this section are exempt from lapsing under § 35-190. If the administration and enforcement fee is set at fifty cents and excess payments have been received, such excess payments shall be credited to the augmentation fund established under § 45-615 and credited among the active management areas in proportion to the amount of such monies collected form each active management area.

§ 45-613. Use of withdrawal fees collected for augmentation and purchase and retirement of grandfathered rights

Monies collected for purposes of augmentation and purchase and retirement of grandfathered rights under § 45-611, paragraphs 2 and 3 shall be used to finance programs only for the benefit of the active management area in which they are collected.

§ 45-614. Setting of groundwater withdrawal fee; statement entered in record; statement transmitted to state treasurer; notice; payment

A. The director, not later than October 1 each year, shall set the groundwater withdrawal fee for each active management area for the following calendar year. In setting the fee, the director shall consider, among other things:

1. The estimated financial requirements for the next fiscal year.

2. The estimated amount of groundwater which will be withdrawn in the active management areas in the next calendar year.

3. The amount of monies collected from groundwater withdrawal fees in the preceding calendar year.

4. Any monies expected to be available for use from the goundwater enforcement fund.

B. The director shall enter in the records of the department a statement of the estimated financial requirements for the next fiscal year and a statement of the groundwater withdrawal fees for each active management area for the next calendar year, itemized to show the amounts to be levied for administration and enforcement, augmentation and purchase and retirement of grandfathered rights. The director shall transmit to the state treasurer a copy of the itemized statement of the groundwater withdrawal fees.

C. Within thirty days after the director sets the groundwater withdrawal fees for the next calendar year, the director shall give notice of the fees by:

1. Giving written notice to the clerk of the board of supervisors of the county or counties in which the active management area is located and to the mayor of each city or town, to each private water company and to the presiding officer of each political subdivision established pursuant to chapter 4, 5, 6 or 7 of this title located in the active management area.

2. Written notice to all holders of groundwater withdrawal permits in the active management area.

D. The groundwater withdrawal fee shall be paid to the department at the time the person withdrawing groundwater files a report on annual groundwater withdrawals pursuant to § 45-632.

§ 45-615. Remittance of collections to state treasurer; divisions of collections into funds

The director shall remit all monies collected by the department pursuant to § 45-611, paragraphs 2 and 3 to the state treasurer who, based on the statement of the director transmitted pursuant to § 45-614, subsection B, shall divide the monies as follows:

1. Monies received for the purpose of augmentation of the water supply of the active management area shall be kept in an augmentation fund. The state treasurer shall maintain within the fund separate accounts for each active management area.

2. Monies received for the purpose of purchase and retirement of grandfathered rights shall be kept in a purchase and retirement fund. The state treasurer shall maintain within the fund separate accounts for each active management area.

ARTICLE 12. ENFORCEMENT

§ 45-631. Definition

In this article, unless the context otherwise requires, "person" means an individual, public or private corporation, company, partnership, firm, association, society, estate, trust, any other private organization or enterprise, the United States, any state, territory or country or a governmental entity, political subdivision or municipal corporation organized under or subject to the constitution and laws of this state.

§ 45-632. Records and annual report of groundwater pumping, transportation and use

A. Each person who is required to file an annual report under this section shall maintain current accurate records of his withdrawals, transportation and use of groundwater as prescribed by the director under subsection J.

B. Except as provided in subsection C, an annual report shall be filed with the director by each person who:

1. Withdraws groundwater in an active management area.

2. Uses groundwater in an active management area, not otherwise reported for such person in a form acceptable to the director.

3. Uses groundwater which is transported from an active management area.

C. Persons who withdraw groundwater from exempt wells and non-irrigation customers of cities, towns, private water companies and irrigation districts, except customers receiving water pursuant to a permit, are exempt from the record keeping and reporting requirements of this section for such water.

D. Persons who are required to report under subsection B, paragraph 1 shall report the following information for each well:

1. The registration number and location of the well.

2. The quantity of groundwater withdrawn from the well since the date of the preceding report.

3. The quantity of fuel or electricity consumed by the pump since the date of the preceding report.

4. The uses to which the groundwater was applied or the persons to whom the groundwater was delivered during the reporting period.

E. Persons who are required to report under subsection B, paragraph 2 or 3 shall report the following information:

1. The source of the groundwater, including:

(a) The name of the person from whom the groundwater was obtained.

(b) The registration number and location of the well, if known.

2. The quantity of groundwater used since the date of the preceding report.

3. The specific uses to which the groundwater was applied during the reporting period.

F. If a person both withdraws groundwater in an active management area and uses such water, he may combine the information required by subsections D and E into one report.

G. The director may require such other information in the report as may be necessary to accomplish the management goals of the applicable active management area.

H. Each report shall contain either a sworn statement or a certification, under penalty of perjury, that the information contained in the report is true and correct according to the best belief and knowledge of the person filing the report.

I. The annual report shall be maintained on a calendar year basis and shall be filed with the director no later than March 31.

J. The records and reports required to be kept and filed under this section shall be in such form as the director prescribes. The director shall prepare blank forms and distribute them on a timely schedule throughout each active management area and furnish them upon request. Failure to receive or obtain the forms does not relieve any person from keeping the required records or making any required report. The director shall cooperate with cities and towns, private water companies and irrigation districts in establishing the form of the records and reports to be kept and filed by them.

§ 45-633. Inspections; investigations and audits

A. The director or his authorized representative may enter at reasonable times upon private or public property where facilities for the withdrawal, transportation or use of groundwater are located, and the owner, manager or occupant of the property shall permit such entry, to:

1. Inspect the facilities for withdrawal, transportation or use of groundwater that are subject to this chapter.

2. Obtain factual data or access to records required to be kept under § 45-632.

3. Ascertain compliance with this chapter.

B. Inspections and investigations under subsection A of this section shall be upon reasonable notice to the owner,

manager or occupant of the property unless reasonable grounds exist to believe that such notice would frustrate the enforcement of this chapter or where entry is sought for the sole purpose of inspecting water measuring devices required pursuant to § 45-604. The director shall adopt regulations for conducting inspections, examining records and obtaining warrants pursuant to this section. The director may apply for and obtain warrants. If warrants are required by law, the director shall apply for and obtain warrants for entry and inspection to carry out the administrative and enforcement purposes of this chapter.

C. The director may require a person who is required to keep records under § 45-632 to appear, at reasonable times and upon reasonable notice, at the director's office and produce such records and information as are specified in the notice to determine whether the records and annual reports required by § 45-632 are complete, true and correct. The director shall audit the records of a sufficient number of persons under this subsection to ensure general compliance with this chapter.

The director shall provide a written report of each inspection, investigation and audit under this section to the person subject to such action.

§ 45-634. Cease and desist order; hearing; injunctive relief

A. If the director finds that a person is violating a provision of this chapter or the rules or regulations adopted pursuant to this chapter, the director may recommend the imposition of a civil penalty and shall issue a written notice for the violator to appear and show cause not less than fifteen days of receipt of the notice why he should not be ordered to cease and desist from such violation. Such notice shall inform the person of the time and place where he may appear to show cause and the consequences of his failure to appear.

B. After the cease and desist hearing, or after the expiration of the time to appear, the director shall issue a decision and order, which constitute the final action by the director.

The person affected may appeal the decision and order of the director to the superior court in the county in which the violation is alleged to have occurred pursuant to title 12, chapter 7, article 6.[1]

C. If the person continues the violation after the director's final decision and order is issued, the director may apply for a temporary restraining order or preliminary or permanent injunction from the superior court according to the Arizona Rules of Civil Procedure. A decision to seek injunctive relief does not preclude other forms of relief or enforcement against the violator.

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[1] Section 12-901 et seq.

§ 45-635. Violation; civil penalties

A. A person who is determined pursuant to § 45-634 to be in violation of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter may be assessed a civil penalty in an amount not exceeding;

1. One hundred dollars per day of violation not directly related to illegal withdrawal, use or transportation of groundwater.

2. Ten thousand dollars per day of violation directly related to illegal withdrawal, use or transportation of groundwater.

B. An action to recover penalties under this section shall be brought by the director in the superior court in the county in which the violation occurred.

C. In determining the amount of the penalty, the court shall consider the degree of harm to the public, whether the violation was knowing or wilful, the past conduct of the defendant, whether the defendant should have been on notice of the violation, whether the defendant has taken steps to cease, remove or mitigate the violation and any other relevant information.

§ 45-636. Violation; classification

A. Unless otherwise specified, a person who knowingly

violates or refuses to comply with a provision of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter is guilty of a class 2 misdemeaner. A person who, after notice of violation, continues in violation of a provision of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter is guilty of a separate offense for each day of violation.

B. A person who knowingly falsifies or renders inaccurate a measuring device required to be installed or maintained under this chapter is guilty of a class 6 felony.

C. A person who knowingly and intentionally withdraws or uses groundwater in violation of this chapter is guilty of:

1. A class 6 felony if the amount of groundwater illegally withdrawn or used is one thousand acre-feet or more.

2. A class 1 misdemeanor if the amount of groundwater illegally withdrawn or used is more than one hundred acre-feet but less than one thousand acre-feet.

3. A class 3 misdemeanor if the amount of groundwater illegally withdrawn or used is one hundred acre-feet or less.

§ 45-637. Groundwater enforcement fund

A. There shall be established a permanent groundwater enforcement fund on July 1, 1982 in an amount of not less than one hundred thousand dollars. The monies in the fund shall be appropriated to the director to:

1. Reimburse the department for costs of actions relating to civil violations of this chapter.

2. Pay the attorney general, county attorneys or appropriate prosecutorial agency for unreimbursed costs of actions for prosecuting criminal violations of this chapter.

B. All civil penalties, assessments and fines collected under this article shall be immediately deposited in the fund.

C. The monies in the fund are exempt from § 35-190 relating to lapsing of appropriations.

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
In Banc

TOWN OF CHINO VALLEY, a municipal corporation formed on behalf of itself and its citizens; WILLIAM J. WELLS, EDWIN F. JOHNSON and EVERET BRISEDINE, for and on behalf of themselves and other persons or legal entities constituting a class too numerous to be named as parties,

Petitioners,

v.

THE STATE LAND DEPARTMENT, a department of the State of Arizona; ANDREW L. BETTY, State Land Commissioner of the State of Arizona; and CITY OF PRESCOTT, a political subdivision of the State of Arizona, a real party in interest,

Respondents.

No. 13602

SPECIAL ACTION

RELIEF DENIED

Udall, Shumway, Blackhurst, Allen, Bentley & Lyons by Dale R. Shumway	Mesa
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Attorneys for Petitioners	
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by Thomas Chandler and Robert E. Lundquist
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Frederick S. Dean, City Attorney — Tucson
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Evans, Kitchel & Jenckes — Phoenix
by Burton M. Apker
Attorneys for Amicus Curiae
ASARCO Incorporated

Fennemore, Craig, von Ammon & Udall — Phoenix
by Calvin H. Udall and James W. Johnson
Attorneys for Amicus Curiae
Duval Corporation

HOLOHAN, Justice

The Town of Chino Valley, a municipal corporation, on behalf of itself and its citizens, together with William J. Wells, Edwin F. Johnson and Everet Brisendine on behalf of themselves and others constituting a class filed this peti-

tion for a special action against the State Land Department, Andrew Bettwy, the State Land Commissioner, and the City of Prescott to prevent enforcement of the 1977 Amendments to the Groundwater Code of 1948.

Because the issues raised in the petition affect not only the vital interest of petitioners but also those of many other citizens, municipalities and business interests, we accepted jurisdiction of the special action.

The 1977 Amendments to the Groundwater Code (Laws 1977, Chapter 29) occurred after this court's decision in *Farmers Investment Company v. Bettwy,* 113 Ariz. 520, 558 P.2d 14 (1976). The problem of competing economic and political interests was brought sharply into focus in the foregoing case. Mining, farming, and municipal interests were engaged in a struggle to satisfy their needs from an ever-decreasing supply of groundwater. This court applied the long-established principles of groundwater to the case, declining to "prefer one economic interest over another on an ad hoc basis," where there was not enough groundwater to satisfy the competing interests. We stated that if one interest was to be preferrred over the other, the Legislature was the appropriate body to designate which economic interest would prevail.

The Legislature accepted this court's suggestion that action be taken, but it quickly became evident that a comprehensive plan for the allocation and distribution of groundwater was a difficult task, charged with controversy. The compromise was an interim solution to deal with immediate and current groundwater uses, and a comprehensive plan to be presented to the Legislature by December 31, 1979 by a special commission. (Laws 1977 Chapter 29 Section 7.)

THE 1977 AMENDMENTS

The 1977 Amendments to the Groundwater Act, A.R.S. § 45-301, *et seq.*, were prefaced by a statement of legislative intent which provided:

Section 1. Legislative findings: declaration of policy

The Legislature of the State of Arizona finds that strict application of existing law preventing the transfer of groundwater jeopardizes the economy and well-being of the people of this state and prevents certain necessary distribution of Arizona's groundwater resources. The Legislature also finds that in view of the rapid depletion of groundwater in this state it is imperative that a comprehensive long-range plan providing for groundwater management in this state be adopted as soon as possible to assure the reasonable use of groundwater resources in this state and for an equitable and dependable allocation and distribution of such resources to provide maximum benefit for the citizens of Arizona.

Therefore, the Legislature declares that the provisions of this act relating to the transfer of groundwater are immediately necessary for the best interests and welfare of the citizens of this state to maintain the economy of this state, to prevent the loss of jobs, and to provide a dependable water supply for Arizona cities and towns. The Legislature further declares that the provisions of this act are intended to apply only until a comprehensive plan providing for groundwater use, allocation, and distribution is implemented in this state.

Laws 1977 Chapter 29 Section 1.

The 1977 Amendments set up a system by which those persons, who prior to January 1, 1977 had been transferring groundwater from and within a critical groundwater area for a specific reasonable and beneficial purpose within or without the area, could continue such use and transfer if they secured a certificate of exemption from the State Land Department. A.R.S. §§ 45-317.01, 317.05.* Prior to the issuance of a certificate of exemption the State Land Com-

*Statutory references are set forth in the Appendix [D]

missioner was required to give notice of the application and hold a hearing. A.R.S. §§ 45-317.05, 317.06. Those dissatisfied with the decision of the Commissioner could appeal to the Superior Court. A.R.S. § 45-317.07. If the transfer of groundwater pursuant to a certificate of exemption injured another's groundwater supply, damages could be recovered but no injunction would be issued by the courts to stop the transfer of the water. A.R.S. §§ 45-317.01(A),(C); 45-317.04.

In December 1977 the respondent City of Prescott filed an application with the State Land Commissioner seeking a certificate of exemption pursuant to A.R.S. § 45-317.05 to continue to transfer water from a critical groundwater area to the area served by the city for domestic and municipal purposes. The petitioners filed this special action asking for relief in a number of areas, but principally that the State Land Commissioner be enjoined from acting under the authority granted him by the 1977 Amendments. It must be noted that petitioners and the City of Prescott have been involved in litigation over the transfer of groundwater since 1972. *Town of Chino Valley v. City of Prescott,* No. 28568, Superior Court of Yavapai County.

REPRESENTATIVE CAPACITY OF PETITIONERS

At the outset we just point out that the Town of Chino Valley may not challenge the constitutionality of the statute on behalf of its citizens. As a creation of the state, the municipality has not been empowered to invoke the personal rights of its citizens against the state. *Town of Wickenburg v. State,* 115 Ariz. 465, 565 P.2d 1326 (App. 1977). *See also Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933).

The petition does not allege any specific interference with a property interest possessed by the Town of Chino Valley. Under the circumstances the town itself is without standing to challenge the constitutionality of the statutes in question;

therefore the Town of Chino Valley is dismissed from this special action.

Concerning the allegations of the remaining petitioners that they represent themselves and others of a class, we limit petitioners to representation of their own interests and decline to recognize any class representation. We find nothing in the Rules of Procedure for Special Actions which authorizes class actions.

The petitioners challenge the constitutionality of the 1977 Amendments on a number of grounds, but the principal contentions involve the claim that the amendments violate the separation of powers provision of the state constitution and that the property rights of petitioners are being taken without just compensation.

Petitioners have also urged that the Legislature has unconstitutionally delegated its powers to a commission created under the 1977 Amendments. Laws 1977 Ch. 29 § 7. The provision in question states:

> E. The commission shall:
>
> * * * * *
>
> 7. By December 31, 1979, prepare a comprehensive final report of commission findings and recommendations for delivery to the governor, the president of the senate and the speaker of the house of representatives. The final report shall contain a draft of recommended constitutional or statutory amendments.
>
> G. If the legislature shall fail to enact a groundwater management code by the first Monday in September, 1981 the code recommended by the commission shall become the law effective on that date without any further authorizing legislation and shall be administered and implemented by the agency designated in the proposed code, or if none is designated, by the department.
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> * * * * *

Laws 1977 Ch. 29 § 7.

The petitioners contend that this is a blatant violation of Articles III and IV of the state constitution. They point out that the legislative power is vested in the Legislature subject only to the right of the people under the Initiative and Referendum process. The Legislature may not delegate its powers to others. *Haggard v. Industrial Commission,* 71 Ariz. 91, 223 P.2d 915 (1950); *Southern Pacific Company v. Cochise County,* 92 Ariz. 395, 377 P.2d 770 (1963); *Loftus v. Russell,* 69 Ariz. 245, 212 P.2d 91 (1949); *Cochise County v. Dandoy,* 116 Ariz. 53, 567 P.2d 1182 (1977).

Although the argument presented by petitioners might have considerable merit if we were required to decide that issue, respondents remind us that the consideration of the issue is premature in that it is pure speculation whether the Legislature will fail to act. Respondents contend that we should refrain from passing on the point because the existence of the Commission does not injure petitioners, and thus there is no need to decide the issue in the abstract.

In *Moore v. Bolin,* 70 Ariz. 354, 220 P.2d 850 (1950) we stated the rule to be that there would be no consideration of the constitutionality of an act if no injury had as yet resulted from the application of the statute and no rights had been brought within its actual or threatened operation. We believe that consideration of the issue concerning the purported power given to the Commission is premature, and we therefore decline to consider the matter at this time.

SEPARATION OF POWERS

Petitioners' first challenge to the constitutionality of the 1977 Amendments is based on Article 3 of the Arizona Constitution which provides for three separate branches of state government with no one of the departments permitted to exercise the powers properly belonging to either of the others. Petitioners point out that Article 6 § 16 of the Arizona Constitution specifically grants the Superior Court

or any judge thereof the power to issue injunctions. It is contended that the 1977 Amendments by forbidding the issuance of injunctions to prevent groundwater transfers violate Article 3 of the state constitution in that it is an attempt by one department of government, the Legislature, to usurp the constitutional powers granted to another department, the Judiciary.

Restrictions on the use of injunctions are certainly not new to Arizona law. The provisons of A.R.S. § 12-1802 which prohibit the issuance of injunctions in a number of specified instances have been a part of this state's laws since 1913. *See* Paragraph 1459 Civil Code Revised Statutes of Arizona, 1913. This court, over the years, has upheld the validity of the statute on a number of occasions. *Hislop v. Rodgers,* 54 Ariz. 101, 92 P.2d 527 (1939); *Corbin v. Rodgers,* 53 Ariz. 35, 85 P.2d 59 (1938); *Council of City of Phoenix v. Winn,* 70 Ariz. 316, 220 P.2d 222 (1950); *City of Tucson, v. Garrett,* 77 Ariz. 73, 267, P.2d 717 (1954); *City of Tucson v. Landry,* 108 Ariz. 106, 493 P.2d 117 (1972). The provision was originally taken from the California Civil Code Section 3423. *Corbin v. Rodgers, supra.*

Although the restriction on the issuance of an injunction appears to impose on the power and authority of the court, such provisions have been construed to apply to limit, as a matter of substantive law, the remedy available to an individual litigant. The distinction between the two concepts was explained in a California Court of Appeals decision as follows:

> "... To the argument that this jurisdiction could not be limited by statute this court said in *Spreckels v. Hawaiian etc. Co.,* 117 Cal. 377, 49 P. 353, and in *Wright v. Superior Court,* 139 Cal. 469, 73 P. 145, that subdivision 1 of section 3423 was an exercise of the legislative power to define the rights of persons. It did not limit the power of courts of equity to issue an injunction wherever the complaint was entitled there-

to, but so operated on the complainant as to take away his right in certain cases to this form of relief." *Loftis v. Superior Court In and For Kings County,* 25 Cal. App. 2d 346, 77 P.2d 491 (1938)

Limitations on the issuance of injunctions to restrain collection of taxes or to interfere in labor disputes are also common provisions in many state statutes. *See* A.R.S. § 42-204(B) and A.R.S. § 12-1808; *Santa Fe Trail T. Co. v. Bowles,* 62 Ariz. 177, 156 P.2d 722 (1945); *State Tax Commission v. Superior Court,* 104 Ariz. 166, 450 P.2d 103 (1969); *Eddy v. Township of Lee,* 73 Mich. 123 40 N.W. 792 (1888); *Lougee v. New Mexico Bureau of Revenue Com'r,* 42 N.M. 115, 76 P.2d 6 (1938); *Denver Local Union No. 13 Etc. v. Perry Truck Lines,* 106 Colo. 25, 101 P.2d 436 (1940).

The various statutes placing limitations on the issuance of injunctions are not limitations on the power of the courts. The statutes are generally viewed as providing a substantive limitation on the remedy or mode of relief sought by a litigant. Parties have no vested right in a particular remedy or mode of procedure and the Legislature may change existing remedies or prescribe new modes of relief provided an efficacious remedy remains. *Steinfeld v. Nielsen,* 15 Ariz. 424, 466, 139 P. 879, 896 (1914); *Brotherhood of American Yeomen v. Manz,* 23 Ariz. 610, 616, 206 P. 403, 405 (1922); *Ray v. Rambaud,* 103 Ariz. 186, 188, 438 P.2d 752, 754 (1968); *see also Gibbes v. Zimmerman, et al,* 290 U.S. 326, 54 S. Ct. 140, 78 L. Ed. 342 (1933); *Denver & R.G.W.R. Co. v. Brotherhood of Railroad Trainmen,* 387 U.S. 556, 87 S. Ct. 1746, 18 L. Ed.2d 954 (1967).

The Legislature in limiting relief for injury caused by groundwater transfers to that of damages did not invade the powers of the Judiciary. The limitation of the remedy under the 1977 Amendments was within the power of the Legislature to create or change remedies for civil wrongs.

EFFECTIVE REMEDY

Petitioners final point is that the limitation of the remedy to that of damages is not an effective remedy. It is argued that under such circumstances, the restriction on the use of injunctions under the 1977 Amendments is not constitutional or that at least it should not be enforced in all cases.

At the outset it must be conceded that the interests which petitioners seek to protect are property rights. We recognized in *Farmers Investment Company v. Bettwy, supra,* that the doctrine of reasonable use as judicially determined in Arizona had become a rule of property and was entitled to protection as such. Under the doctrine of reasonable use property owners have the right to capture and use the underground water beneath their land for a beneficial purpose on that land, but no landowner can transport water off the land from which it came if the transfer injured the water supply of neighboring property owners.

Petitioners contend that damages are inadequate to protect their property right in the water supply beneath their lands. They argue that, if an effective remedy is not provided by statute for the taking of their property right, the statute permitting the taking should be declared unconstitutional. Alternatively, petitioners contend that if an effective remedy is not provided the courts should use the powers granted them by the Arizona Constitution and issue injunctions to prevent the injury being caused by the groundwater transfers.

General legislation will not be declared unconstitutional unless a person has been deprived of all existing remedies for enforcement of a right. *Drachman v. Jay,* 4 Ariz. App. 70, 417 P.2d 704 (1966); *Brinkheroff-Faris Trust & Savings Company v. Hill,* 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930). The 1977 Amendments limit the remedy of landowners to that of money damages. A.R.S. § 45-317.04. The amendments provide that the court or jury shall award damages as

are just and reasonable for all past, present and future injury. A.R.S. § 45-317.04(C). In addition those injured by a groundwater transfer may recover reasonable attorney's fees, expert witness expenses and fees and court costs.

Finally it must be noted that a certificate of exemption is authority to transfer a limited amount of water for the same purposes for which the transfer was made prior to January 1, 1977. A.R.S. § 45-317.01(B). In general the amount of water capable of being transferred is governed by the history of previous use.

With the limitations on the amount of water transferred set forth in the 1977 Amendments and mindful that the statutory scheme is a temporary one we cannot say that the remedy of damages is inadequate. Particularly we cannot make such a finding in the case of petitioners because the facts are in dispute as to the nature of their injury. From the pleadings it appears that groundwater transfers by the City of Prescott have occurred from 1962 to the present. The nature and extent of petitioners' injury is a matter involved in litigation previously noted in this opinion. We reserve the right under our constitutional authority to act if in fact in a particular case no other adequate remedy but injunction is available. *See Valley National Bank of Phoenix v. Apache County,* 57 Ariz. 459, 114 P.2d 883 (1941); *McCluskey v. Sparks,* 80 Ariz. 15, 291 P.2d 791 (1955); *Southern Pacific Company v. Cochise County,* 92 Ariz. 395, 377 P.2d 770 (1963).

From the foregoing we do not find those sections of the 1977 Amendments considered in this case to be unconstitutional; therefore the relief sought by petitioners is denied.

WILLIAM A. HOLOHAN, Justice

CONCURING:

JAMES DUKE CAMERON, Chief Justice

FRED C. STRUCKMEYER, JR.,
Vice Chief Justice

JACK D. H. HAYS, Justice

NOTE: Justice Frank X. Gordon, Jr. did not participate in the determination of this matter.

GROUNDWATERS - TRANSFERS

CHAPTER 29

SENATE BILL 1391

An Act relating to waters; prescribing procedures for transferring groundwater from and within critical groundwater areas; provid ng for certain rights, liabilities and remedies relative to groundwater; providing for disposition of municipal treatment plant water; providing for a groundwater management study commission; providing for a moratorium on designating new critical groundwater areas; amending sections 45-301 and 45-311, Arizona Revised Statutes; amending title 45, chapter 1, article 7, Arizona Revised Statutes, by adding sections 45-317.01 through 45-317.15; amending sections 45-320 and 45-324, Arizona Revised Statutes, and making appropriations.

Be it enacted by the Legislature of the State of Arizona:

Section I. Legislative findings: declaration of policy

The Legislature of the State of Arizona finds that strict application of existing law preventing the transfer of groundwater jeopardizes the economy and well-being of the people of this state and prevents certain necessary distribution of Arizona's groundwater resources. The Legislature also finds that in view of the rapid depletion of groundwater in this state is imperative that a comprehensive long-range plan providing for groundwater management in this state be adopted as soon as possible to assure the reasonable use of groundwater resources in this state and for an equitable and dependable allocation and distribution of such resources to provide maximum benefit for the citizens of Arizona.

Therefore, the Legislature declares that the provisions of this act relating to the transfer of groundwater are immediately necessary for the best interests and welfare of

the citizens of this state to maintain the economy of this state, to prevent the loss of jobs, and to provide a dependable water supply for Arizona cities and towns. The Legislature further declares that the provisions of this act are intended to apply only until a comprehensive plan providing for groundwater use, allocation, and distribution is implemented in this state.

Sec. 2. Section 45-301, Arizona Revised Statutes, is amended to read:

§ 45-301. Definitions

In this article, unless the context otherwise requires:

1. "Annual use" means the amount of groundwater actually withdrawn annually for the irrigation of irrigated land averaged over the last five years in which such land was actually irrigated.

2. "Critical groundwater area" means any groundwater basin as defined in paragraph 6 or any designated subdivision thereof, not having sufficent ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal.

3. "Department" means the state land department.

4. "Exempted well" means a well or other works for the withdrawal of ground water used for domestic, stock watering, domestic water utility, industrial or transportation purposes and a well for the irrigation of not to exceed three hundred twenty acres of land actually used by a bona fide established public or private secondary school or institution of higher learning having at least one hundred full-time students enrolled, which secondary school or institution is engaged in the teaching of or experimentation in the science of agriculture, and where the curriculum of such school or institution includes a course in the study of or experimentation in the science of agriculture, provided the use of water produced from any such well shall be limited

to such purposes only and neither the water produced from the well nor such well shall be leased, sold or otherwise disposed of whereby other interests may acquire or use the same for any other purpose. If any such school or institution ceases to teach the science of agriculture, the right to produce water from such well for irrigation purposes shall terminate.

5. "Groundwater" means water under the surface of the earth regardless of the geologic structure in which it is standing or moving. It does not include water flowing in underground streams with ascertainable beds and banks.

6. "Groundwater basin" means land overlying, as nearly as may be determined by known facts, a distinct body of ground water, but the exterior limits of a groundwater basin shall not be deemed to extend upstream or downstream beyond a defile, gorge or canyon of a surface stream or wash.

7. "Groundwater subdivision" means an area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of a groundwater basin.

8. "Irrigation district" means a district organized by law for the irrigation of the lands comprising the district, whether designated as an irrigation district, water conservation district, water users' association, mutual irrigation project or otherwise.

9. "Irrigated land" means land in a critical groundwater area owned or leased by a person which may lawfully be irrigated with groundwater.

10. "Irrigation well" means any well or works for the withdrawal of groundwater primarily used for irrigation purposes and having a capacity in excess of one hundred gallons per minute.

11. "Notice of intention to drill" means the notice required to be sent to the state land department by all persons intending to drill new wells.

12. "Owner of land" means any person in whom legal title to real property is vested or any person having an equitable interest in real property.

13. "Permit" means a permit to construct and operate a well or other works for the withdrawal of ground water.

14. "Person" includes an individual, firm, political subdivision, public or private corporation or government agency.

15. "Retired irrigated land" means irrigated land which has been and is retired from irrigation anytime after its inclusion in a critical groundwater area, except such land which shall have been retired becuase pumping groundwater had become uneconomical.

16. "User of ground water" means any person who is putting ground water to a beneficial use primarily for irrigation purposes.

17. "Well" means a pit, hole or shaft sunk into the earth in order to obtain groundwater from a subterranean supply.

Sec. 3. Section 45-311, Arizona Revised Statutes, is amended to read:

§ 45-311. Modification of orders; dissolution of critical groundwater areas

An order of the department issued pursuant to this article may be altered, modified or dissolved in the manner and at such times as provided in this article for the designation or alteration of a critical groundwater area, but no petition to abolish a critical groundwater area shall be received by the department within one year following a rejection of an identical petition. The fact that irrigated land is being withheld from irrigation shall not be prima facie evidence that there is no longer a valid reason for the existence of a critical groundwater area.

Sec. 4. Title 45, chapter 1, article 7, Arizona Revised Statutes, is amended by adding sections 45-317.01 through

4 5 -
317.15, to read:

§ 45-317.01. Existing groundwater transfers from critical groundwater areas

A. A person who, prior to January 1, 1977, was transferring groundwater from land within a critical groundwater area for reasonable and beneficial use within or from such critical groundwater area designated prior to January 1, 1977, and such person's successors in interest, shall not be enjoined from making such transfer if the transfer is in accordance with a certificate of exemption, as provided in this article. A person injured by such transfer shall be entitled to recover damages pursuant to § 45-317.04.

B. A transfer pursuant to subsection A of this section shall be limited to the same purposes for which the transfer was made prior to issuance of the certificate of exemption and to an annual amount equal to the highest consecutive twelve-month amount which was transferred by such person within the eight years preceding January 1, 1977 and, if an industrial user, to the amount which would have been transferred for the same purposes from pumping and delivery facilities actually in place and capable of production during such twelve-month period but for the temporary availability of alternate supplies actually used; except that the amount specified in the certificate of exemption shall not be less than the amount of the annual use of the retired irrigated land owned or leased by the applicant prior to January 1, 1977 which is or has been retired by June 1, 1977. Notwithstanding § 45-301, as to irrigated land owned or leased prior to January 1, 1977 which is or has been retired by June 1, 1977, by a person transferring groundwater pursuant to subsection A of this section, "annual use" for the purposes of this article means the annual amount equal to the average of the amounts of groundwater withdrawn for the irrigation of such land in the five highest consecutive years, treating only those years in which the land was

actually irrigated as consecutive, in the period beginning eight years prior to purchase and ending January 1, 1977. A city or town which, prior to January 1, 1977, was transferring groundwater from a critical groundwater area pursuant to a court order may transfer an amount of groundwater from such critical groundwater area not to exceed the annual use of the irrigated land owned or leased by the city or town prior to January 1, 1977.

C. A person who is transferring grounwater from land within a critical groundwater area designated prior to January 1, 1977 for the irrigation of land within such critical groundwater area and from wells permitted or registered under § 45-304, 45-313 or 45-316, and his successors in interest, shall not be enjoined from transferring the amount of groundwater necessary for irrigation of the crops historically grown on such lands prior to January 1, 1977, and no certificate of exemption shall be required. A person injured by such transfer shall be entitled to recover damages pursuant to § 45-317.04. A person adjudicated to be making transfers to the injury of others and for which damages are awarded shall thereafter file the annual report required pursuant to § 45-317.08 and shall be subject to termination of the right to transfer pursuant to § 45-317.09 as if such transfer were included in a certificate of exemption.

§ 45-317.02. Certain future groundwater transfers from critical groundwater areas

Transfers of groundwater by any person or his successors in interest from retired irrigated land located in any critical groundwater area acquired or leased after January 1, 1977, or acquired or leased prior to January 1, 1977, by persons not making transfers prior to January 1, 1977, for any reasonable and beneficial use within or from the critical groundwater area shall not be enjoined to the extend such transfers do not exceed the annual use of groundwater on such land if such transfers are made pursuant to a certificate of exemption issued pursuant to this article.

§ 45-317.03. Transfers by public service corporations and political subdivisions

A. Cities and towns engaged in the distribution of groundwater primarily for domestic purposes may pump and transfer such water within the service area of such city or town for the benefit of landowners and residents, and no certificate of exemption shall be required. Such transfer of groundwater shall not establish a presumption of injury to others. For purposes of this subsection, "service area" means that area of land actually being served water as of January 1, 1977 plus any additions to such area which contain an operating distribution system owned by the city or town primarily for the delivery of domestic water.

B. Political subdivisions existing as of January 1, 1977, and engaged in the distribution of groundwater primarily for irrigation purposes may pump and transfer such water for the benefit of landowners within the service area of such political subdivision, and no certificate of exemption shall be required. Such transfer of groundwater shall not establish a presumption of injury to others within the political subdivision. For the purposes of this subsection, "service area" means that area of land actually being served water as of January 1, 1977 within the boundaries of the political subdivision plus any additions to such area which contain an operating system of canals, flumes, ditches and other works owned or operated by the political subdivison primarily for the delivery of irrigation water.

C. Public service corporations engaged in the distribution of groundwater primarily for domestic purposes, may pump and transfer such groundwater for the benefit of landowners and residents within the service area of such public service corporation, and no certificate of exemption shall be required. Such transfer of groundwater shall not establish a presumption of injury to others. For the purposes of this subsection, "service area" means that area of land within a certificated area actually being served water

as of January 1, 1977 by a public service corporation plus any additions to such area within the certificated area which contain an operating distribution system owned by the public service corporation primarily for the delivery of domestic water.

D. No service area may be extended primarily for any of the following purposes:

1. Including a well field within the service area.

2. Furnishing disproportionately large amounts of water to industrial or any other large users if such users could not themselves lawfully obtain water from the same sources in the same quantities.

3. Providing agricultural water from inside a critical groundwater area to an area out of such critical groundwater area.

E. Each city, town, other political subdivision and public service corporation engaged in the distribution of groundwater shall furnish to the department maps clearly delineating each service area, distribution system and such other related data as the department may require.

§ 45-317.04. Recovery of damages for injury caused by transfers of groundwater from a critical groundwater area

A. Except as provided in § 45-317.03 and subsection D of this section, nothing in this article shall limit the right of any person to recover damages for any transfer of groundwater within or from a designated critical groundwater area which causes impairment of or damage to his groundwater supply.

B. Except as provided in § 45-317.03, injury shall be conclusively presumed to have resulted from the transfer and use of groundwater out of the critical groundwater area.

C. If injury is found from the transfer of groundwater within or from a designated critical groundwater area, the

court or jury shall consider all relevant circumstances and award damages as are just and reasonable for all past, present and future injury. In addition, the court may if damages are nominal and otherwise shall if damages are substantial award reasonable attorney's fees, expert witness expenses and fees and court costs. An offeree of judgment shall not be awarded such fees and expenses incurred after an offer of judgment has been made in accordance with the rules of civil procedure if the final judgment is not more favorable to the offeree than the offer of judgment.

D. Damages shall not be recoverable for transfer of that portion of the annual use of retired irrigated land which would not actually have returned to the water table from the continued use of such water on irrigated land nor shall damages be recoverable for transfers otherwise found to be lawful.

§ 45-317.05. Certificate of exemption; application; notice

A. Certificates of exemption shall be issued for the purpose of describing specific uses and amounts of groundwater which shall not be enjoined if found to constitute transfers of groundwater. Neither the application for nor the issuance of the certificate shall constitute an admission or finding that any groundwater withdrawn and used by the applicant is or is not a transfer or is not in violation of law or in violation of another's rights. Neither application for nor issuance of a certificate of exemption shall prohibit additional lawful development and use of groundwater by such person.

B. Except as provided in subsection C of § 45-317.01 and in § 45-317.03, a person who, prior to January 1, 1977, was transferring groundwater from a designated critical groundwater area shall by December 31, 1977, apply to the department for a certificate of exemption. If a claim is made that a transfer of groundwater is not pursuant to a certificate required by this section, and for good cause

shown excusing the failure to timely file, the department may accept an application after the filing deadline.

C. No person shall commence a groundwater transfer pursuant to § 45-317.02 without obtaining a certificate of exemption. Upon request of the applicant and after giving ten days' notice to the persons described in subsection E of this section, the department may issue a provisional certificate for the transfer of groundwater for such period of time and for such amount of water and upon such terms as determined by the department pending issuance of a certificate.

D. The application shall include the following:

1. The name and mailing address of the applicant.

2. The quantity of groundwater use for which application for certification is made.

3. The name and address of the owner of the land on which each well is located from which groundwater is to be withdrawn and for which application is made.

4. The location of each well from which groundwater is to be withdrawn.

5. To the extent information is reasonably available to the applicant:

(a) The depth and diameter and general specification of each well.

(b) The length and position in feet below the land surface of any casing used.

(c) The location and specifications of each perforated zone in the casing.

(d) The depth in feet from the land surface to the static groundwater level.

(e) The depth in feet from the land surface to the position of the pumping level and the depth of the setting of the pump bowls.

6. The name of the critical groundwater area from which

groundwater is to be withdrawn.

7. Legal description within ten acres of the land on which groundwater is to be used.

8. The specific purpose and amount of groundwater to be used and:

(a) If for uses pursuant to § 45-317.01, the highest amount of groundwater used in any consecutive twelve-month period in the eight years preceding January 1, 1977. If for industrial purposes, the industrial output, including the amount of ore milled if for mining purposes.

(b) The legal description and a map of all irrigated land owned or leased by the applicant in the critical groundwater area or areas in or from which a transfer is to be made, the annual use for the applicable period and identification of the lands withheld or proposed to be withheld from irrigation.

9. To the extent information is reasonably available to the applicant, the annual amount of groundwater withdrawn from each well described in paragraph 4 of this subsection for each of the five calendar years immediately preceding the application, and tabulations of the monthly energy consumption for each such well for the same period of time.

10. The sworn statement that the information contained in the application is true and correct.

11. Such other information as the department may require.

E. Upon receipt and filing of this application, the department shall, within thirty days of the filing, give written notice by first-class mail of such filing to all owners on record of wells on record with the department in the critical groundwater area within ten miles of any well for which application is made. In addition, written notice shall be given to the clerk of the board of supervisors of the county or counties, the mayor of each city or town, each certificated water company and to the residing officer of each

irrigation, electrical and agricultural improvement district and water users' association located wholly or partly within the critical groundwater area. Notice shall also be published once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in which the critical groundwater area is located.

F. The application shall be deemed filed upon its receipt together with the required filing fee by the department at its office in Phoenix.

§ 45-317.06. Certificates; issuance; hearing; contents

A. The department shall issue a certificate to the applicant unless the department determines that the information contained in the application is incorrect or is insufficient to issue a certificate or unless written objections are received within sixty days of the date of the notice provided for in § 45-317.05, subsection E. If the department determines that the information contained in the application is incorrect or is insufficient to issue a certificate, the department shall return the application specifically stating the reasons for returning the application. The applicant may reapply within thirty days of receipt of return or may appeal the determination by special action pursuant to § 45-317.07. A reapplication shall relate back to the date of the filing of the original application but shall otherwise be treated as a new application.

B. If written objections to the notification are received, the department shall hold a hearing on such application. Objections may be made on the basis that the information in the application is incorrect or insufficient to issue a certificate and to the total quantity of groundwater claimed pursuant to § 45-317.01 and to the quantity of annual use on irrigated land. The department shall, thirty days prior to the date of the hearing, give written notice in the manner and to the persons described in § 45-317.05, subsection E.

C. The hearings shall be held at the office of the depart-

ment in Phoenix not less than sixty days nor more than ninety days after the expiration of the time in which to file objections. The department shall enter its findings and order within thirty days of the hearing.

D. In determining the annual use of groundwater for irrigated land, the department shall ascertain the quantity of water actually pumped from all wells and applied to such land for the applicable five-year period. The withdrawals from all wells shall be established as accurately as possible from any records of measurement, power consumption, energy or fuel cost, crop data or other information from which the amount of actual withdrawal can be estimated, including any sworn statements of persons acquainted with irrigation on the land as to the amounts or estimations of amounts of pumping from the wells. The total annual quantity pumped from all wells and applied to the land for each of the five applicable years shall be added and divided by five to state the annual use of groundwater attributable to such land.

E. The certificate of exemption issued by the department shall contain the following:

1. The name and mailing address of the person to whom the certificate is issued.

2. The specific purposes for which the groundwater will be used.

3. The locations of the sources of supply and the places of use.

4. The total annual amount of groundwater for which the certificate is issued and shall separately state:

(a) The annual use of groundwater on retired irrigated land owned or leased by the applicant within the critical groundwater area.

(b) The annual use of groundwater on irrigated land owned or leased by the applicant within the critical groundwater area and not retired.

(c) Other quantities of groundwater to be used and the source of such groundwater.

F. The certificate of exemption shall be filed with the department and recorded by the applicant in the county or counties in which the source of supply and place of use are located.

G. Except as provided in § 45-317.10, to the extent the quantity of groundwater provided for in a certificate of exemption is not used for the purpose stated in the certificate in a given year, such groundwater may not be used for any other purpose. Non-use for any length of time for any reason shall not cause the quantity provided for in the certificate to be diminished.

H. Nothing in this article shall prohibit replacing, deepening or changing the location of any wells supplying water included in a certificate of exemption if the total quantity of groundwater included in the certificate which is used and transferred is not increased. A person replacing, deepening or changing the location of such a well shall provide the department with such information as the department may require concerning such change. The department may adopt rules and regulations for changing the location of any wells in critical groundwater areas to prevent unreasonably increasing damage to surrounding land from the concentration of wells by any person in any portion of a critical groundwater area and requiring that the new location bear a reasonable relationship to the retired irrigated land where applicable. If the location of a well is changed from that described in the certificate, the department shall amend the certificate accordingly. The provisions of § 45-317.04 shall apply to transfers of groundwater from wells relocated, deepened or replaced under this article, except that if the well is relocated off the retired irrigated land where it was originally situated and the new location does not bear a reasonable relationship to the retired irrigated land if applicable, then with respect to all transfers made under

§ 45-317.02, other than those made primarily for domestic purposes, the provisions of subsection D of § 45-317.04 shall not apply.

§ 45-317.07. Exemption certificates; appeal

A. An applicant or person whose rights are affected by the granting or denial of a certificate of exemption may within thirty days of the final decision of the department, appeal by special action to the superior court in Maricopa county, which court may change or modify the decision of the department.

B. A copy of the petition shall be served upon the department and upon all persons who appeared and participated in the hearing before the department within ten days after it is filed. The department shall answer the petition within twenty days from service and, with the answer, transmit to the court the records and files in the matter on appeal. The appeal shall be determined de novo upon the records and files of the department and upon further evidence adduced by the parties.

C. The filing of such appeal shall not stay transfers pursuant to § 45-317.01 but shall stay transfers applied for pursuant to § 45-317.02, unless the court, for cause shown, finds that such stay would cause irreparable harm, in which event the court may allow such transfer pending appeal on conditions specified by the court.

§ 45-317.08. Annual reports

A. The holder of a certificate of exemption shall file on or before March 1 of each year, for the preceding calendar year, an annual report with the department stating;

1. The name and mailing address of the holder of the certificate.

2. The quantity of water pumped monthly from each well covered by the certificate during the preceding year, and if used in mining operations, the amount of ore milled.

3. The purpose for which the groundwater was withdrawn and used.

4. The location of the use of groundwater withdrawn.

5. Tabulations of monthly energy consumption of the preceding twelve-month period for each well from which groundwater was withdrawn.

6. The sworn statement that the information contained in the report is true and correct.

7. Such other information as the department may require.

§ 45-317.09. Revocation of permit

The department shall review certificates of exemption annually. The department may revoke a certificate of any person who negligently transferred groundwater in excess of the amount in the certificate and shall revoke a certificate of any person who knowingly violated the terms of the certificate or filed a false application or report with the department.

§ 45-317.10. Retirement of irrigated land

A. The past withdrawal or future withholding from irrigation of irrigated land in a critical groundwater area shall not constitute a waiver or abandonment of the right to use groundwater on such land for irrigation. The owner of such land may at any time return the land to irrigation or make any other beneficial use of groundwater on such land if all transfers pursuant to the certificate or exemption are terminated.

B. When a holder of a certificate of exemption is transferring groundwater, the right to use groundwater for any purpose on retired irrigated land shall be limited to that portion of the annual use not transferred.

C. Notwithstanding subsections A and B of this section, a person making groundwater transfers under a certificate of exemption issued pursuant to § 45-317.01 for uses beginning prior to January 1, 1977, who, in any calendar year,

sells or continues to irrigate or returns to cultivation after June 1, 1977 irrigated land in the critical groundwater area which was acquired or leased prior to January 1, 1977, shall not make any transfers which are not made in respect of retirement of such person's remaining retired irrigated land except those transfers otherwise specifically found to be lawful and the amount of groundwater set forth in such person's certificate of exemption shall be deemed amended accordingly.

D. A person who owns or leases irrigated land within a designated critical groundwater area and retires such land from irrigation shall continue to have the rights and obligations of a user of groundwater as provided in this article.

§ 45-317.11. Enforcement of provisions restricting transfers of groundwater

This article shall not affect any articles of incorporation, bylaws, rules or regulations or contracts which contain or provide for restrictions on transfers of groundwater.

§ 45-317.12. Groundwater transfers not from critical groundwater areas

A person may withdraw and transfer groundwater from land that has not been designated a critical groundwater area in amounts necessary for reasonable and beneficial use on land inside or out of the groundwater basin or subdivision from which the groundwater is withdrawn, and shall not be enjoined from transferring groundwater in amounts which do not cause material injury. A landowner injured by such transfer shall be entitled to recover damages. In addition, the court may in its discretion if damages are awarded, award reasonable attorney's fees, except an offeree of judgement shall not be awarded such attorney's fees incurred after an offer of judgment has been made in accordance with the Rules of Civil Procedure if the final judgment is not more favorable to the offeree than the offer of

judgment. Neither injury to nor impairment of the water supply of another landowner shall be presumed from the fact of transfer.

§ 45-317.13. Special certificate of exemption to meet industrial capacity

A. An industrial user which has a certificate of exemption issued pursuant to § 45-317.01, for an annual quantity of groundwater less than that necessary for the use of the maximum capacity of its industrial facilities actually completed and capable of productive operations as of January 1, 1977, may apply to the department for a special certificate of exemption for an additional annual quantity of groundwater up to the amount necessary for use of such industrial capacity.

B. The application for a special certificate of exemption shall include:

1. The name and address of the applicant.

2. The maximum capacity of its industrial facilities actually completed as of January 1, 1977.

3. The total amount of groundwater needed to operate its industrial facilities at their maximum capacity on January 1, 1977.

4. The total amount of groundwater which may be transferred pursuant to a certificate of exemption issued pursuant to § 45-317.01.

5. The amount of groundwater for which the application is made.

6. The location of the well or wells to be used by the applicant to provide the additional groundwater.

7. The sworn statement that the information contained in the application is true and correct.

8. Such other information as may reasonably be required by the department.

C. An applicant for a special certificate of exemption shall include with its application a copy of an executed, binding contract with a financially responsible private entity or with a governmental agency providing for the delivery of water to the applicant beginning not less than six years from the date of the application. Such contract shall be for an amount of water equal to or more than the additional amount requested in the application and such water shall be from a source outside the critical groundwater area from which the applicant is transferring water pursuant to a certificate of exemption.

D. The provisions of § 45-317.05, subsection E and §§ 45-317.06 and 45-317.07 shall apply to an application for a special certificate of exemption. If an appeal is filed, no transfer of additional groundwater may be made pending the outcome of the appeal.

E. Subject to the applicant's compliance with the requirements of subsections B and C and upon a determination that the applicant has a bona fide contract for the delivery of imported water within six years from the date of the application, the department shall grant a special certificate of exemption setting forth the quantity in excess of the amount set forth in the certificate of exemption issued pursuant to § 45-317.01. The special certificate of exemption shall automatically expire six years from the date of the application, unless extended under subsection J of this section.

F. The holder of a special certificate of exemption shall file with the department an annual report which shall include:

1. The name and address of the holder of the certificate.

2. The total amount of groundwater transferred by the holder in the previous twelve months.

3. A statement as to all steps taken to fulfill the delivery of water pursuant to the contract required in subsection C of this section.

4. A statement that the information contained in the report is true and correct.

5. Such other information as may reasonably br required by the department.

G. The amount of groundwater transferred pursuant to the special certificate of exemption for each year shall be fifty per cent of the annual amount to be imported under the contract or the difference between the quantity required for the maximum capacity of the industrial facilities and the quantity provided for in the original certificate of exemption whichever is the smaller. If the annual amounts to be provided under the contract vary from year to year, the groundwater transferred under the special certificate of exemption in each year shall be adjusted to reflect the increase or decrease in the amount of imported water for the corresponding year of the contract.

H. Upon delivery of imported water under the contract into the critical area, a person who transferred water pursuant to a special certificate of exemption in prior years shall use at least fifty per cent of such imported water actually received in each year to reduce the amount of groundwater transferred out of that portion of the critical area from which the additional amount of groundwater was withdrawn and transferred. The obligation for such use of fifty per cent of imported water shall continue until the total amount of imported water so used shall equal the total amount of additional groundwater actually transferred and used under the special certificate of exemption.

I. Any transfer pursuant to this section shall be subject to the provisions of § 45-317.04.

J. For good cause shown beyond control of the applicant, the department may extend a special certificate of exemption upon such terms and conditions as the department may direct, provided the extensions shall not exceed three years.

K. Special certificates of exemption shall be subject to

review by the department at any time and shall be subject to termination if the contract for delivery of water from a source outside the critical groundwater area is no longer binding or is not capable of performance.

§ 45-317.14. Exchanges and disposition of municipal treatment plant water

If a city or town contract exchanges or disposes of treated and reclaimed water which results in a decrease in pumping in a critical groundwater area by the person receiving such water, the city or town may pump groundwater from wells located in the same vicinity in the critical groundwater area where such water is delivered and transfer such water within or without the critical groundwater area for beneficial use, in an amount contracted for but in no event to exceed the amount delivered to such person, without the necessity of obtaining a certificate of exemption. Such transfer by a city or town shall not be permitted to the extent the holder of a special certificate under § 45-317.13 receiving such exchange water is required to reduce his pumping under such certificate. A person injured by such transfer shall be entitled to recover damages pursuant to § 45-317.04.

§ 45-317.15. Rights not affected

Except as specifically modified, enlarged or limited by § 45-317.01, § 45-317.04, subsection C, and §§ 45-317.12 and 45-317.13, this article shall not affect any claims or defenses in any litigation pending on the effective date of this act.

Sec. 5. Section 45-320, Arizona Revised Statutes, is amended to read:

§ 45-320. Fees

The department shall collect, in advance, the following fees:

1. Filing application for permit to construct a well, three dollars.

2. Making a copy of a document filed in this office, ten cents for each one hundred words or fraction thereof.

3. Certifying copies, documents, records or maps, one dollar for each certification.

4. Furnishing blueprint or photostat copy of any map, drawing or document required by the department, actual cost of the work.

5. Issuing permit to construct a well, five dollars.

6. Filing notice of intention to drill, three dollars.

7. Filing application for certificate of exemption, five hundred dollars.

Sec. 6. Section 45-324, Arizona Revised Statutes, is amended to read:

§ 45-324. Enforcement

The department shall, and any aggrieved person may, enjoin or restrain any violation of this article.

Sec. 7. Groundwater management study commission

A. A groundwater management study commission is established as of November 1, 1977. The commission shall consist of twenty-five members as follows:

1. Seven currently serving members of the senate as appointed by the president of the senate one of whom shall be the president. No more than four such members shall be from the same political party.

2. Seven currently serving members of the house of representatives appointed by the speaker of the house one of whom shall be the speaker. No more than four such members shall be from the same political party.

3. Eleven members appointed by the governor to include:

(a) Two persons representing cities and towns.

(b) Two persons representing mining.

(c) Two persons representing agriculture.

(d) One person representing the Indian communities.

(e) One person representing electric utilities.

(f) Three other persons.

B. The president of the senate and the speaker of the House of representatives shall serve as co-chairmen.

C. Members appointed by the governor are eligible to receive compensation as determined pursuant to § 38-611. All members of the commission are eligible for travel and subsistence reimbursement as provided for state officers.

D. The commission shall not duplicate, but shall utilize and coordinate its activities with the studies and plans of the Arizona water commission. The commission may use the expertise, services, information and facilities of the Arizona legislative counsel, the senate, the house of representatives, the office of economic planning and development, the Arizona water commission, the state land department, the state game and fish department and may, as necessary, employ or contract for the advice and services of professionals and experts in law, hydrology and the management and regulation of groundwater.

E. The commission shall:

1. Review existing groundwater law, statutory, regulatory and judicial and review the various groundwater statutory and regulatory schemes employed by other states of the United States, and various proposals set forth in learned or professional publications for the best development, utilization and conservation of groundwater, including proposals for management of groundwater.

2. Make studies, conduct inquiries and investigations and hold hearings, if necessary, to determine and evaluate:

(a) Existing groundwater conditions throughout the state.

(b) The present and anticipated future water uses and needs of the communities, industries and agriculture in all areas of the state, including, but not limited to, projected populations of communities, projected industrial development, including projected milling tonnage for mines and power generation for electric utilities and projected acreage and water use by agriculture.

(c) Existing plans of communities, industries and agriculture in all areas of the state for using, developing and conserving groundwater and other water sources in the future to satisfy their respective water needs.

(d) Alternative proposals for developing, utilizing and conserving groundwater and other water sources for meeting the present and future water needs of the state.

(e) The availability and feasibility of sources of water as alternatives or supplements to groundwater use.

(f) The environmental impact of existing and future uses and present and future plans for development and using groundwater and alternative proposals for such uses and plans.

3. Make findings and recommendations and prepare legislation to provide for the best development, utilization and conservation of groundwater in the state, including utilization of alternative sources of water, methods of management of groundwater resources throughout the state, limiting depletion to reasonable rates and establishment of incentives to encourage efficiency, conservation, reuse of groundwater and importation of water. Such legislation shall not deny cities, towns or other municipal corporations the right to set water or power rates or otherwise manage their systems of distribution of water or electricity.

4. Annually, by December 31, report to the governor and the legislature on the activities and expenditures of the commission.

5. By June 30, 1979, prepare a draft report of commis-

sion findings and recommendations for delivery to the governor, the president of the senate, and the speaker of the house of representatives. The report shall be made available to interested parties and members of the public.

6. Hold public hearings on the report to receive comments, criticism and suggested revisions.

7. By December 31, 1979, prepare a comprehensive final report of commission findings and recommendations for delivery to the governor, the president of the senate and the speaker of the house of representatives. The final report shall contain a draft of recommended constitutional or statutory amendments.

F. The commission may apply for and receive grants and other funding to carry out its duties.

G. If the legislature shall fail to enact a groundwater management code by the first Monday in September, 1981 the code recommended by the commission shall become the law effective on that date without any further authorizing legislation and shall be administered and implemented by the agency designated in the proposed code, or if none is designated, by the department.

H. The recommendations of the groundwater management study commission transmitted to the legislature under this act shall, upon their effective date as provided in subsection G, supersede all provisions of law in conflict therewith and shall be published with the laws of the state.

Sec. 8. No new critical areas

Notwithstanding any provisions of title 45, chapter 1, article 7, Arizona Revised Statutes,[1] no additional critical groundwater areas shall be designated until the first Monday in September, 1981.

[1] Section 45-301 et seq.

Sec. 9. Appropriations; purpose; lapsation

A. The sum of one hundred thousand dollars is appropriated to the groundwater management study commission for the purpose of carrying out the functions prescribed in this act.

B. The sum of four hundred ninety thousand dollars is appropriated to the state land department for the purpose of carrying out the functions prescribed in this act.

C. The appropriations made by this section are exempt from the provisions of § 35-190, Arizona Revised Statutes, relating to lapsation of appropriations except that all monies remaining unexpended and unencumbered on December 31, 1979 shall revert to the state general fund.

Sec. 10. Non-severability

If any portion of this act is finally adjudicated invalid, the entire act shall be null and void. The provisions of this act are intended to be non-severable.

Sec. 11. Emergency

To preserve the public peace, health and safety it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

Approved by the Governor, May 2, 1977.

Filed in the Office of the Secretary of State, May 2, 1977.

Excerpts From Final Report
June 1980

ARIZONA GROUNDWATER MANAGEMENT STUDY COMMISSION

CHAPTER I*

The Groundwater Commission: Its Mandate and Background in Arizona Groundwater Law

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In order to better understand the complexity of the Commission's task and the new Groundwater Management Code, it is helpful to review the physical dimensions of Arizona's groundwater problems, Arizona's past groundwater laws and previous efforts of the Legislature to enact groundwater management legislation. This chapter addresses these subjects.

THE PROBLEM

Arizona's major water problem is an imbalance between consumption of water and the dependable supply. As of 1977, Arizonans are annually consuming approximately 2.5 million acre feet more water than is replenished. The State relies on groundwater resources for over sixty percent of its water supplies and is literally "mining" its groundwater to keep up with continually expanding water uses. As the Arizona Water Commission (AWC) reported in 1975:

> For years Arizonans have been using water more rapidly than Mother Nature has replenished it. This is possible only through the massive borrowing of waters banked as groundwater reserves in past geologic ages. In many areas of Arizona, natural replenishment rates are very small and the mining of groundwaters is analogous to the mining of oil in other parts of the country.[1]

* Footnotes have been renumbered

[1] *Inventory of Resource and Uses: Phase 1-Arizona State Water Plan, Summary,* Arizona Water Commission, July, 1975, p. 28.

In 1975, the AWC also reported:

- Substantial amounts of groundwater remain in storage. However, the annual rate of recharge of this important resource is very limited and most of the water stored in the ground is available only for one time use.
- Arizona has an estimated total dependable supply of 2,800,000 acre feet. Of this amount only 11 percent or slightly more than 300,000 acre feet represents the annual rate of recharge or dependable groundwater supply.
- Agriculture currently consumes 89 percent of all water used in the State, municipal and industrial uses, 10 percent, and fish and wildlife, 1 percent.
- The ratio of consumption to supply...is most pronounced in Pima County where use is 4.7 times supply. Uses for municipal and industrial purposes alone exceed total supply in Pima County...
- In Maricopa County even though a substantial dependable supply is available as surface water, depletion is taking place at 1.9 times the replenishment rate. The impact on Maricopa County groundwaters alone, however, is much more severe with depletion amounting to over thirty times the rate of natural recharge.
- In the three central Arizona counties of Maricopa, Pinal, and Pima, the estimated annual overdraft is 1.8 million acre feet. The estimated long-term water supply that will be imported to central Arizona via the Central Arizona Project is 1.2 million acre feet per year or two-thirds the current rate of overdraft.[2]

[2] *Ibid.*, pp. 33 and 34.

* * * *

Prior to the Groundwater Management Code of 1980, the only statutory controls on groundwater use were enacted by the Legislature in 1948, only after Governor Osborn called the Legislature into six special sessions and only after an official warning from the Secretary of the Interior that groundwater in Arizona must be subjected to regulation or the Central Arizona Project would not be authorized. The 1948 Code, known as the Critical Groundwater Code, was intended to be a stop-gap measure, designed to slow depletion, while serving as a foundation for future legislation. It was not seen then as the solution to the problem, yet it remained in the statutes until 1980 relatively unchanged.

This code empowered the State Land Department[3] to declare critical groundwater areas where there was insufficient groundwater to provide a reasonably safe supply for irrigation of the lands then in cultivation. It did not place any limits on the amount of groundwater that could be pumped by any user but only limited expansion of irrigated acreage and placed restrictions on new agricultural wells.

The Critical Groundwater Code and the rule of reasonable use did not reduce or control Arizona's groundwater overdraft nor did they provide a framework for future groundwater management. Furthermore, Supreme Court decisions interpreting the doctrine of reasonable use as it applied to critical groundwater areas severely restricted the allocation of groundwater to meet changing water needs. The Commission's Draft Report cited the following problems:

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[3] Laws 1979, Chapter 139 transferred this responsibility to the A.W.C. [The A.W.C., established pursuant to Ariz. Rev. Stat. § 45-121, is continued within the Department of Water Resources by Ariz. Rev. Stat. § 45-104. The Department was established pursuant to Ariz. Rev. Stat. § 45-102.]

1. The rule of reasonable use is not founded on sound hydrological principles. Groundwater does not respect property ownership boundaries. In a given groundwater basin or subdivision of a basin, property owners are withdrawing groundwater from a common source of supply. The rule of reasonable use, however, allows development of groundwater by a landowner for beneficial use on his land even though he may be interfering with or diverting groundwater from under his neighbor's land.
2. The rule of reasonable use encourages wasteful uses and depletion of the resource. Under this rule, the specific amount of groundwater a landowner may pump for use on his land is not determined. The rule requires uses to be reasonable and beneficial, but no uses of groundwater on the "land from which it is pumped" have ever been determined unreasonable or non-beneficial.
3. The rule of reasonable use creates uncertainty and encourages litigation. For example, the rule, as interpreted by the court, prohibits the transportation of water from one parcel to another parcel even when both overlie the common supply if lands or wells of another landowner located in the area from which the groundwater is being pumped are injured. The court, however, has never defined "parcel" or "transportation" and it is unclear under what circumstances transportations will be allowed. Since transportation of groundwater is a primary method of obtaining water to meet new and expanded water needs, this uncertainty creates potential problems.
4. The Critical Groundwater Code has not limited the expansion of agriculture and reduced withdrawals as originally intended. Because of ineffective enforcement provisions, some alleged violations of

the code (illegal expansion of acreage and illegal well-drilling) have occurred.

5. The Critical Groundwater Code and the rule of reasonable use have primarily placed limits on non-agricultural groundwater uses. Although non-agricultural uses are not specifically regulated by the code, the Arizona Supreme Court has ruled that the transportation of groundwater from land within a critical groundwater area for use on land outside the critical groundwater area is an illegal use under the reasonable use doctrine. These "illegal uses" account for a large portion of the water suplies of several municipalities, mining companies and other industries.

Many provisions of the Groundwater Management Code of 1980 were founded on the concerns expressed above. The new code effectively negates the rule of reasonable use in active management areas[4] and the Critical Groundwater Code has been repealed.

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[4] See Chapter 3 for an explanation of "active management areas" and other provisions of the Code. [Chapter 3 has not been reproduced herein.]

F-1

In The
Superior Court of the State of Arizona
IN AND FOR THE COUNTY OF YAVAPAI

DIVISION I

HON: Porter Murry,
Presiding Judge

Case Number: 28568

BARBARA BOYLE, Clerk

By: Janie Roberts

November 3, 1980

TITLE:	COUNSEL:
Town of Chino Valley, et al	Frank J. Barry
Plaintiff	For Plaintiff
vs.	and
City of Prescott	Bill Stephens
	Chester R. Lockwood, Jr.
Defendant	For Defendant

HEARING ON: NATURE OF PROCEEDING

The following Order was signed by Judge Porter Murry on October 29, 1980, and received and entered of record this 3rd day of November, 1980, to-wit:

Formal written Order having been signed and filed herein, now therefore it is Ordered granting Defendant's Motion to Dismiss Plaintiff's Complaint for Injunction; further Ordered that the class action in the above-entitled case be dismissed and that Plaintiff may have 20 days in which to file amended complaint setting forth any damages.

Copies of the foregoing were mailed to counsel of record on November 3, 1980

JANIE ROBERTS
Deputy Clerk of Superior Court

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties.

Plaintiffs-Appellants,

v.

THE CITY OF PRESCOTT, a municipal corporation,

Defendant-Appellee.

No. 15501

Appeal from the Superior Court of Yavapai County
Cause No. 28568
Honorable Frank X. Gordon, Jr., Judge
Honorable Porter Murry, Judge

RESPONSE TO MOTION TO AMEND OPINION AND JUDGEMENT

Appellee CITY OF PRESCOTT does not dispute that the appeal in this matter to the Arizona Supreme Court was taken and prosecuted not only by the Town of Chino Valley but by the three individually named plaintiffs on behalf of themselves. Appellee does want to clarify herein, however, that although the three individually named plaintiffs joined in taking this appeal on their own behalf, they could not have taken it on behalf of the class named in the caption of this suit. The Order dismissing Plaintiffs' Complaint for Injunction, which Plaintiffs' appealed from, also contained language dismissing the class action. That portion of the order was not appealed from. (See Minute Entry of October 17, 1980, and Order entered therefrom, CR83, also cited in Defendant's Answering Brief at p.2.)

Appellee feels that the Opinion of the Arizona Supreme Court adequately disposes of the claims of the three individually named plaintiffs without the need for amendment of the Court's Opinion. If the Court believes the language of the Opinion does not sufficiently encompass the claims of these three individually named plaintiffs whereever the Opinion refers to the claims of the Town of Chino Valley, Defendant has no objection to the adding of their names in summary fashion to show that their claims brought on behalf of themselves were disposed of in the same manner as the claims of the Town of Chino Valley.

RESPECTFULLY SUBMITTED this 29th day of December, 1981.

STEPHENS & TOLES, P.C.

By /s/ BILL STEPHENS
BILL STEPHENS
CAROL BENYI
1010 East Jefferson Street
Phoenix, Arizona 85034

Attorneys for Defendant -
Appelle, CITY OF PRESCOTT

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties.

Plaintiffs-Appellants,

v.

THE CITY OF PRESCOTT, a municipal corporation,

Defendant-Appellee.

Supreme Court No. 15501
Court of Appeals No. 1 CA-CIV 5728
Yavapai County No. 28568

The following action was taken by the Supreme Court of the State of Arizona on January 15, 1982 in regard to the above-entitled cause:

"ORDERED: Motion to Amend Opinion and Judgement = DENIED.

FURTHER ORDERED: Motion for Rehearing = DENIED.

FURTHER ORDERED: Request That Mandate Be Stayed = DENIED."

Mandate enclosed herewith.

S. ALAN COOK, Clerk

By /s/ ANNA L. CATES
Chief Deputy Clerk

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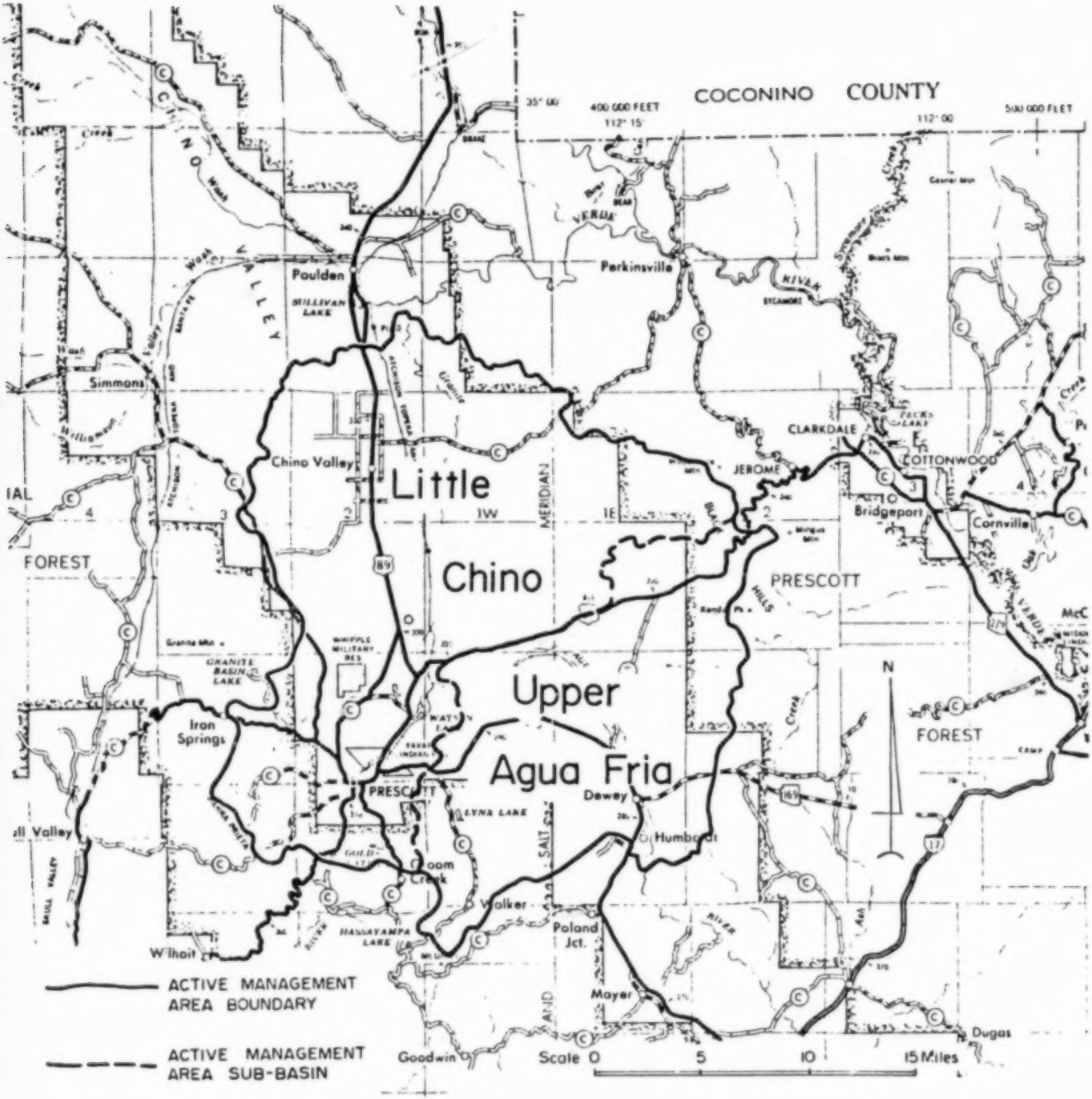
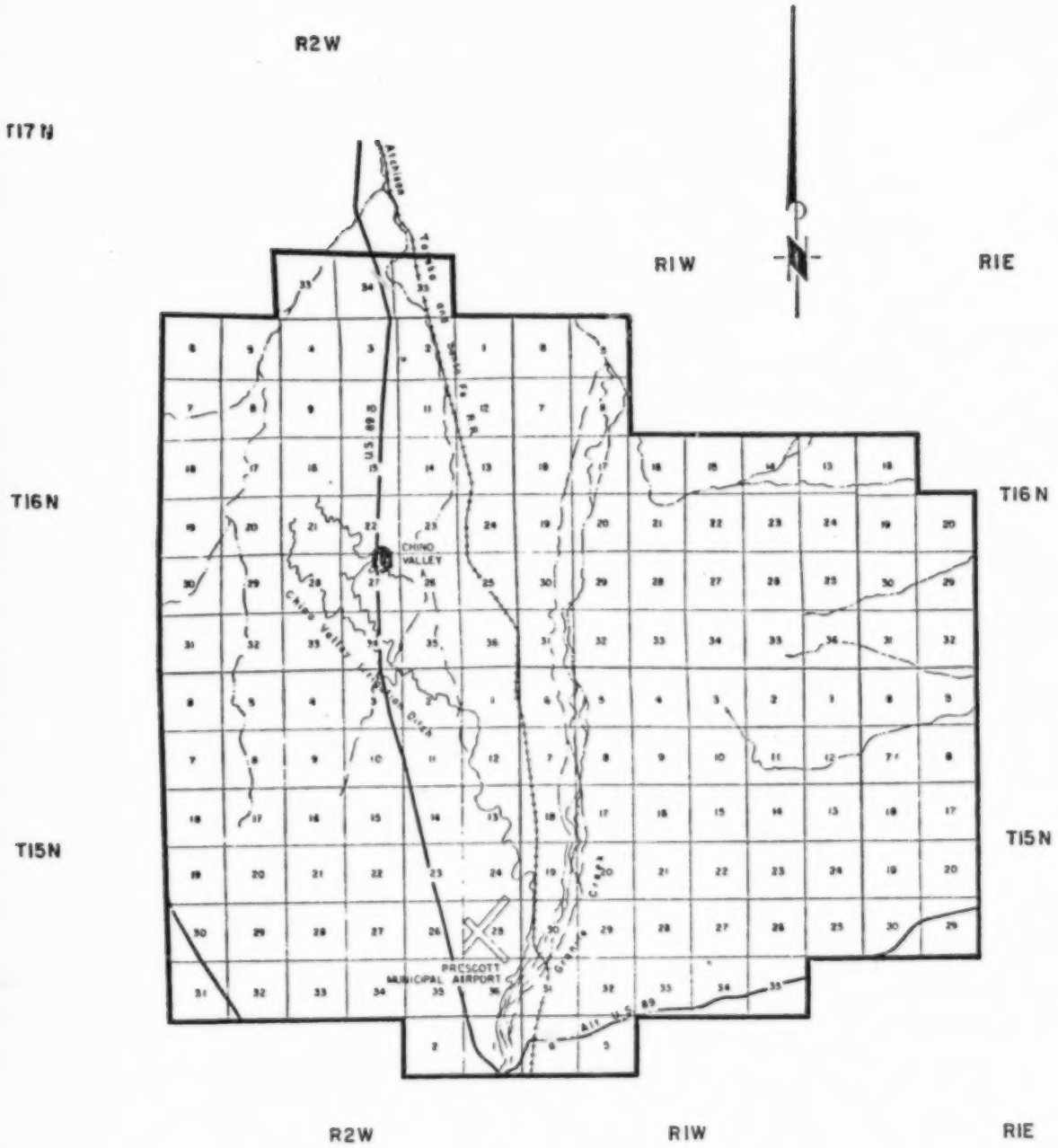


ARIZONA WATER COMMISSION

PRESCOTT ACTIVE MANAGEMENT AREA

June 1980

APPENDIX I



BOUNDARY OF ESTABLISHED CRITICAL AREA

GRANITE CREEK
Critical Ground Water Area

Established March 12, 1962

APPENDIX J

Appellant's Reply Brief

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FILED
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No. 81-1882

In The Supreme Court of the United States

October Term, 1981

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties,

Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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No. 81-1882

In The Supreme Court of the United States

October Term, 1981

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties,

Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

1. Contrary to appellee's assertion that Arizona groundwater law "has long been a subject of controversy", if there is one aspect of Arizona groundwater law which sets it apart from other jurisdictions it is its unwavering adherence to the principle that the owner of the soil owns the water found therein in the same manner and to the same extent as he owns the sand, rock and gravel as a part thereof.

Appellee further asserts "... the issue of the exact nature of the right which an owner may have in groundwater beneath his land has never been determined prior to the present case." However, *Bristor v. Cheatham* ("Bristor II"),

75 Ariz. 227, 255 P.2d 173 (1953), plainly established the groundwater ownership right of the landowner as that recognized by the common law but controlled by the reasonable use rule. Certainly this determination is not dictum. So also each of the other Arizona Supreme Court decisions appellants reviewed in their Jurisdictional Statement [except the case of *State ex rel. Morrison v. Anway*, 87 Ariz. 206, 349 P.2d 774 (1960)] of necessity found a property right as supporting its adjudication and stated its acceptance of that determination by its citation to *Bristor II*.

The unequivocal statement of Justice Struckmeyer in *State ex rel. Morrison v. Anway, supra*, at page 208, that "... water filtrating or percolating through the soil beneath the surface of the land in undefined and unknown channels is a component part of the earth, having no characteristics of ownership distinct from the land itself and therefore belongs to the owner of the soil. ...", may have been dictum, but it is clear that this statement reflected the considered and settled view of Justice Struckmeyer and the Arizona Supreme Court since it was restated as the *ratio decidendi* in *Farmers Investment Co. v. Pima Mining Co.*, 111 Ariz. 56, 523 P.2d 487 (1974). In that case, the Arizona State Land Department had leased 319 acres of state trust land to Pima Mining Co. for a ten year term at a rental of one penny per 1000 gallons of water removed or $10.00 per year, whichever was greater. Pima drilled four large wells in the lease area and in 1972 pumped and removed 3,163,842,000 gallons of groundwater. Farmers Investment Company, as the user of the groundwater for its pecan orchard, claimed to be adversely affected by the removal of groundwater by Pima and challenged the commercial lease as illegal under the Enabling Act. Section 28 of Arizona's Enabling Act, 36 Stat. 557, 568-579, under which these trust lands were ac-

quired by Arizona, provides that "... any sale or contract for the sale of any timber or other natural product of such lands" can lawfully be made only after appraisal and at public auction, after notice.

Justice Struckmeyer, writing for the Arizona Supreme Court, noted (111 Ariz. at 57) that Farmers Investment Company "... has a right in the waters percolating beneath the soil, which is common to all overlying landowners within the groundwater area. *State ex rel. Morrison v. Anway*, 87 Ariz. 206, 349 P.2d 774 (1960)." The Court then held the lease illegal and void as an attempted sale of a natural product of the soil—groundwater—in violation of the Enabling Act. In so holding the Arizona Supreme Court said:

> Water is a thing of value directly derived from the land to be considered as a product of the land within the meaning of the Constitution and Enabling Act.
>
> We hold that the most cursory reading of the Enabling Act and Constitution compels the conclusion that water beneath the soil is a product of the land. As such, it must be sold to the highest and best bidder at public auction *in the same manner as timber, stone and gravel.* 111 Ariz. at 58 (emphasis added).

So, also, in *Neal v. Hunt*, 112 Ariz. 307, 541 P.2d 559 (1975), the Arizona Supreme Court upheld a lower court injunction which, while protecting the water resources of an adjoining landowner named Hunt under the rule of *Bristor II* by enjoining withdrawal and removal of any groundwater in excess of 300 gpm, recognized Neal's ownership rights in his groundwater by permitting the pumping and removal of groundwater for use away from the premises on the basis that the transfer of that amount of groundwater did not result in injury to Hunt. The Court also approved the order of the trial court retaining jurisdiction to protect the respective rights of the parties.

In *Neal v. Hunt, supra,* the Arizona Supreme Court cited with approval the statement in *Fourzan v. Curtis,* 43 Ariz. 140, 147, 29 P.2d 722 (1934) that: "It is the law in Arizona that percolating waters belong to the owner of the land on which they are found. . . ." 112 Ariz. at 314.

The impact of the 1980 Act[1] and the abrupt about-face of the Arizona Supreme Court in upholding the constitutionality of the Act literally guts the economic value of thousands of acres of state trust land as well as lands in private ownership. The economic value of Arizona land to its owners is uniquely dependent upon access to its groundwater, since the state's few surface water sources have long been over appropriated. To deny a landowner the right to utilize the groundwater which is and has long been regarded as belonging to the owner of the land and without which the land is, in many instances, substantially worthless, is not only legally wrong, but is morally unsupportable. In this regard the 1980 Act constitutes a breach of the trust imposed by the Enabling Act.

Appellee cites various state appellate court decisions dealing with groundwater legislation. Judge Breitenstein in *Williams v. Wichita,* 279 F.2d 375, 377 (10th Cir. 1960), in approving the refusal of a lower court to proceed with a water adjudication case, recognized that in groundwater law matters each state is indeed "an island". He said:

> We do not know, and are not advised, if in Kansas rights to underground waters are absolute on the theory that the owner of the land owns that below and above the surface, if they are correlative and subject to the rule of reasonable use, or if they are dependent upon appropriation and application to beneficial use. Such rights may or may not differ if they involve the

[1] As used in the Jurisdictional Statement, the "1980 Act" or the "Act" refers to Chapter One, Laws of 1980, 4th Special Session, 34th Arizona Legislature.

> waters of definite underground streams, percolating water, or artesian waters. Rights to the use of underground waters depend upon state law and vary greatly. They should be determined by local law.

Compare: Stewart v. Stewart, 249 P. 197 at 207 (Cal. 1926), regarding variations in western states' community property laws.

2. Appellee questions the finality of the judgment which is the subject of this appeal. Yet the very cases upon which appellee relies highlight the finality of appellant's federal constitutional challenge to the 1980 Act and to the decision of the Arizona Supreme Court. This case fits within either one of the first two categories of cases mentioned in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), wherein a judgment is considered final for purposes of 28 U.S.C. §1257. This is a case "... in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive ..." 420 U.S. at 479. This is also a case "... in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings." 420 U.S. at 480.

Here, unlike the eminent domain cases relied upon by appellee, the 1980 Act makes no provision for compensation with respect to the taking of appellants' property. Thus, the justness of that compensation cannot be at issue in any trial of appellants' claim for damages for past illegal withdrawals of groundwater by appellee. Appellee's reliance on these cases is therefore misplaced.

Finally, in any case, none of the unnamed members of the class are a party to the damage claim and as to such

class members there can be no question that the judgment on the federal constitutional issue is final.[2]

3. In support of its assertion that the police power justifies the destruction of appellants' property rights by the 1980 Act, appellee points to a "pattern of shared benefits and burdens." Close analysis of the cited benefits and burdens shows that appellants suffer all the burdens while appellee Prescott, a political subdivision of the State of Arizona, reaps the benefits. First, appellants' ability to irrigate their lands is restricted by the Act. Next, contrary to appellee's assertion, Prescott, as a neighboring landowner, is given the unrestricted right to deplete the common water reserve. No per capita consumption limitations or other conservation methods have been imposed to in any way restrict Prescott's pumping. Whether such restrictions will be imposed on Prescott in the future is pure speculation. The Act permits unrestricted access to the groundwater resource by mines and others for uses within a vast sub-basin. Finally, the 100-year supply restriction prevents appellants from placing their lands to best use, while permitting Prescott and others within Prescott's service area to reap the economic benefit of the waters beneath appellants' lands.

---

[2] Appellee disputes the class action nature of this appeal, however, the record does not support its assertion. The order of the trial court appealed from (Appendix A) included the dismissal of a previously certified class. The notice of appeal (Appendix B) was from the entire order. Appellants' briefs in the Arizona appellate courts were filed on behalf of the class as well as the individual appellants. The caption of the case in the Arizona Supreme Court indicates that the appeal was on behalf of the class. *See*, p. A-1, Appendix A, Jurisdictional Statement herein. Finally, the Arizona Court of Appeals denied (Appendix C) a motion to dismiss appellants' appeal in the Arizona courts urged by appellee on the basis that the judgment of the trial court was not final and appealable under Arizona law.

Contrary to appellee's argument, the exercise of the police power in the public interest does not justify the destruction of vested property rights whether those rights are established by case law or by statute.

4. Any further meaningful response to the appellee's Motion to Dismiss or Affirm has been frustrated by the entire failure of appellee to respond to appellants' specific illustrations of how the 1980 Act impinges in specific instances upon specific constitutional rights of appellants. Illustratively, appellants have pointed out that the initial active management area maps which imposed the burdens, expropriations, and restrictions upon appellants and their property were drawn and prepared outside the legislative process by persons not authorized to do so and without any legislative direction or authorization as to how the boundaries of the "initial active management areas" and their "sub-basins" were to be determined.

Appellants have shown that by the device of creating an arbitrary sub-basin named "Little Chino sub-basin" by legislative adjudication and by arbitrarily including the City of Prescott and the Chino Valley area in this sub-basin, the entire groundwater resource of appellants is exposed to exploitation by Prescott seventeen miles distant, because of the statutory authorization in the 1980 Act to appellee to extend its service area by filing a map of its claimed "service area" and to pump and transport groundwater from any point and to any point within such "service area".

Generalizations respecting the broad sweep of the police power in the public interest gussied-up with "precious water" references and the need for conservation of a "precious resource" offer an elusive target to appellants but which, on being recognized for the "red herring" which it is, requires no response.

CONCLUSION

The Motion to Dismiss or Affirm should be denied, and the issues set forth in the Jurisdictional Statement should be granted plenary consideration.

RESPECTFULLY SUBMITTED this 18th day of May, 1982.

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By /s/ MARK WILMER
Mark Wilmer

By /s/ ROBERT B. HOFFMAN
Robert B. Hoffman

Attorneys for Appellant

CERTIFICATE OF SERVICE

Robert B. Hoffman, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for appellants herein.

2. That this 18th day of May, 1982, the Brief In Opposition To Motion To Dismiss Or Affirm submitted herewith has been served upon counsel of record in accordance with the provisions of Rule 28.3 of the Rules of this Court by placing three copies of the same in the United States mail, first-class postage prepaid, properly addressed to each of:

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Attorneys for Appellee

James W. Johnson
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Von Ammon & Udall, P.C.
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Attorneys for Purported Intervenor

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28, Rules of the United States Supreme Court.

/s/ ROBERT B. HOFFMAN
Robert B. Hoffman

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

TOWN OF CHINO VALLEY, a municipal corporation, et al., Plaintiffs, vs. THE CITY OF PRESCOTT, a municipal corporation, Defendant.	No. 28568 ORDER

Defendant's Motion for Reconsideration of the Order of April 7, 1980, denying Defendant's Motion to Dismiss, having been argued by counsel, Bill Stephens and Chester R. Lockwood, Jr., for Defendant, and Frank J. Barry, for Plaintiffs, on the 14th day of October, 1980, and the Court, the Honorable Porter Murry, Judge presiding, having taken the matter under advisement, and now, the Court having considered the written and oral arguments of counsel,

IT IS ORDERED granting Defendant's Motion to Dismiss Plaintiff's Complaint for Injunction.

IT IS FURTHER ORDERED that the class action in the above entitled action be dismissed and that Plaintiff may have 20 days in which to file amended complaint setting forth any damages.

DATED this 29th day of October, 1980.

/s/ PORTER MURRY
Judge

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties, Plaintiffs, vs. THE CITY OF PRESCOTT, a municipal corporation, Defendant.	No. 28568 NOTICE OF APPEAL

Notice is hereby given that the above-named plaintiffs appeal to the Court of Appeals of the State of Arizona from the Order made and entered in this action on the third day of November, 1980; that said Order granted Defendant's Motion to Dismiss Plaintiffs' Complaint for Injunction.

Dated this 13th day of November, 1980.

By /s/ FRANK J. BARRY
Attorney for Plaintiffs

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties, Plaintiffs-Appellants, v. THE CITY OF PRESCOTT, a municipal corporation, Defendant-Appellee.	1 CA-CIV 5728 DEPARTMENT B Yavapai County Superior Court No. C-28568 ORDER

Appellee's motion to dismiss, the response thereto, the reply thereto, and appellants' request for leave to file a response to appellee's reply, and appellee's motion for an extension of time for the filing of the answering brief, and the response thereto, were considered by the court, Presiding Judge Levi Ray Haire and Judges William E. Eubank and Joe W. Contreras participeting.

IT IS ORDERED denying appellee's motion to dismiss this appeal.

IT IS FURTHER ORDERED extending the time for the filing of the answering brief herein to and including April 17, 1981. In the absence of compelling circumstances, no further extensions will be granted.

Intervenor's Brief

MOTION FILED
MAY 17 1982

No. 81-1882

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

TOWN OF CHINO VALLEY, et al.,

Appellants,

vs.

THE CITY OF PRESCOTT,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF ARIZONA

MOTION OF THE STATE OF ARIZONA FOR LEAVE TO INTERVENE AND PROPOSED MOTIONS TO AFFIRM AND DISMISS

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MOTION TO INTERVENE

The State of Arizona moves this Court for leave to intervene as appellee in this matter, pursuant to 28 U.S.C. § 2403(b), and further requests that the Court accept the State's accompanying Proposed Motions to Dismiss and Affirm as the Motions of the State of Arizona as appellee.[1]

This appeal involves an attack upon the constitutionality of the 1980 Arizona Groundwater Management Act. That Act is a comprehensive statute for the regulation and management of the use of groundwater in Arizona.

The use of groundwater is a matter of

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[1] Fennemore, Craig, von Ammon & Udall, A Professional Corporation, appears on behalf of the State of Arizona as Special Counsel for the Arizona Department of Water Resources for this case pursuant to Arizona Revised Statutes ("A.R.S.") Section 45-104.G: "The director [of the Department of Water Resources] may employ legal counsel to advise him, represent the department in connection with legal matters before other departments and agencies of this state, and represent the department and this state in litigation concerning affairs of the department. . . ."

critical State concern. Fifty-two per cent of the State's total water consumption is represented by groundwater. Some areas, such as the City of Tucson, are totally dependent upon groundwater resources. Present rates of groundwater withdrawal are 7 times the rate of recharge.[2]

The importance of the Groundwater Management Act to the State of Arizona is apparent from the Legislature's declaration of policy in the Act itself:

> A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its

---

[2] See pages 17-18 of the proposed Memorandum in Support of Motion to Affirm attached.

> citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.
>
> B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

This action arises in the context of a dispute among litigants involving claims to the right to use groundwater. The State's interest is thus not coextensive with the interests of the parties.

The State of Arizona therefore requests that it be permitted to intervene as an appellee pursuant to 28 U.S.C. § 2403(b) and to respond to the Jurisdictional Statement through the accompanying proposed Motions to Dismiss and Affirm.

RESPECTFULLY SUBMITTED this 17th day of May, 1982.

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No. 81-1882

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

TOWN OF CHINO VALLEY, et al.,

Appellants,

vs.

THE CITY OF PRESCOTT,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF ARIZONA

PROPOSED MOTIONS OF THE STATE OF ARIZONA TO AFFIRM AND DISMISS

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SUMMARY OF ARGUMENT AND INTRODUCTION

The ultimate issue in this appeal is whether the Legislature of the State of Arizona has the authority under the police power to regulate and allocate the use of groundwater among competing groundwater users.

The issue is not, as appellants cast it in their Jurisdictional Statement, whether the Arizona Supreme Court correctly decided as a matter of State law that there is no ownership in groundwater until it has been pumped for beneficial use. That is patently an issue of State law and one this Court should not consider. Whether groundwater is owned or not owned under Arizona law should have no bearing on this case. All property is held subject to the police power of the State to regulate its use for the general welfare.

The 1980 Arizona Groundwater Management Act was a valid exercise of the

police power, and the decision of the Arizona Supreme Court should be affirmed.

None of the other issues which appellants seek to raise here was properly presented to the Court below. Nor did the Court rule on those other issues. As to all such issues, the appeal should therefore be dismissed.

The 1980 Arizona Groundwater Management Act ("1980 Act" or "Act") is a comprehensive statute regulating the use of groundwater. It clarifies the nature of groundwater rights. It allows all existing uses of groundwater to continue subject to reasonable conservation, adopts procedures for controlling new uses, requires conservation by existing and future groundwater users, and mandates implementation of programs by the State Department of Water Resources for groundwater management and augmentation to assure the long-term reliability of the State's groundwater supplies.

Compelling circumstances attended passage of the Act. One was the severe rate of groundwater overdraft throughout many parts of the State. Groundwater is being consumed at seven times the rate of recharge. The resulting depletion of groundwater in storage cannot be sustained indefinitely.

Another circumstance was conflict about when and under what conditions groundwater could be moved from the well from which it was withdrawn to some other place for use. The transportation of groundwater was the original issue in this case: whether the City of Prescott may pump water from wells it owns in the Chino Valley and transport the water for use in the City of Prescott.

The issue of transportation, like the issue of ownership, was properly before the Court below. But those issues of State law should not be reexamined here. The 1980 Act has been sustained under the

police power, and the judgment upholding the exercise of that power should be sustained regardless of prior law on ownership and transportation.

The final sections of this memorandum will briefly demonstrate that even if this case were not governed by the police power, the Arizona Supreme Court's decisions defining the nature of groundwater rights under state law involve no federal questions.

Appellants are incorrect in their assertions of ownership. The Arizona Supreme Court has never held that there is any ownership in groundwater under Arizona law except to capture and use it as regulated by the Legislature.

Appellants base their "ownership" argument upon dictum in an early Arizona case and assert that by repetition as dictum it rose to the dignity of a rule of property. This is not the law of Arizona. There is no right under Arizona law to

rely upon the dicta of the Arizona courts. Further, appellants' position is based upon ascribing to this dictum a meaning which is contrary to the results and holdings in Arizona groundwater rights cases.

The determination below rests upon a fair and substantial basis.

MOTION TO AFFIRM

In its unanimous opinion in Town of Chino Valley v. City of Prescott ("Chino Valley II"), 131 Ariz. 78, 638 P.2d 1324 (1981), the Arizona Supreme Court passed on five of the issues which the appellants seek to raise here. The Arizona Supreme Court's holdings are based upon correct interpretations of State law which this Court should not review and do not involve substantial federal questions. The decision of the Arizona Supreme Court should be affirmed.

The relevant holdings were:

First, the Arizona Supreme Court squarely rejected the major premise of the appellants' appeal, i.e. that appellants "own" the corpus of unpumped groundwater beneath their lands:

> We therefore hold that there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water. 131 Ariz.

at 82, 638 P.2d at 1328.

Second, consistent with its holding that there is no ownership in unpumped groundwater, the Arizona Supreme Court held that the 1980 Act does not violate "the Fifth and Fourteenth Amendments to the Constitution of the United States . . . as a taking of property without due process of law and just compensation . . . ." Id.

Third, the Arizona Court specifically approved the State Legislature's invocation of the police power and stated:

> We do not doubt but that the overdraft of groundwater in this state is a serious problem which has no chance of correcting itself, and that it is necessary for comprehensive legislation to both limit groundwater use and allocate its use among competing interests. Id. at 83, 638 P.2d at 1329.

Fourth, the Arizona Court held that the 1980 Act applies prospectively and is not a legislative encroachment on judicial powers. Id. at 83, 638 P.2d at 1327.

Fifth, in accordance with the fore-

going holdings, the Arizona Court upheld Section 45-541(A) of the 1980 Act which allows the transportation of groundwater within a sub-basin of an Active Management Area without liability for damages. This holding subsumes appellants' arguments here and below that the Act unconstitutionally allows cities, towns and private water companies to pump and transport groundwater within their service areas without liability provided the withdrawal and use are within the same groundwater sub-basin.

None of the other matters raised by appellants was presented by the parties to the Court below. These include everything discussed on pages 14 through 22 of the Jurisdictional Statement ("JS") except for the service area issue mentioned above. The appeal should be dismissed as to these matters.

It is difficult to identify precisely what issues the appellants seek to raise on these pages. The matters asserted appear to condense into the following two issues:

1. Whether the procedures used by the Legislature to designate Initial Active Management Areas were unconstitutional; and,

2. Whether the distinctions drawn between different classes of water users under the 1980 Act discriminate in violation of the equal protection clause of the Fourteenth Amendment.

Neither of these issues nor any of the facts and arguments appellants assert concerning them were timely raised below. They should not be considered on this appeal. Whether questions fall within the scope of 28 U.S.C. § 1257(2) for appeals or § 1257(3) for certiorari, this Court has said they will not be considered if not timely presented below. See Wilson v. Cook, 327 U.S. 474, 479-85, 66 S. Ct. 663, 666-69 (1946); White River Lumber Co. v. Arkansas ex rel. Applegate, 279 U.S. 692, 700, 49 S. Ct. 457, 460 (1929); Chicago, Indianapolis & Louisville Railway Co. v. McGuire, 196 U.S. 128, 132-33, 25 S. Ct. 200, 201 (1905); Fuller v. Oregon, 417 U.S. 40, 50 n.11, 94 S. Ct. 2116, 2123 n.11 (1974); Tacon v. Arizona, 410 U.S. 351, 352, 93 S. Ct. 998, 999 (1973); Cardinale v. Louisiana, 394 U.S. 437, 438-39, 89 S. Ct. 1161, 1162-63 (1969).

Appellants imply that equal protection arguments were raised below by virtue of

the Fifth and Fourteenth Amendments having been "set out in haec verba in an appendix to the appellants' opening brief".[1] (JS 3) Appellants go on to state that the Arizona Supreme Court rejected their claims and purport to quote the Supreme Court's holding as follows:

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[1] Appellants' motion for rehearing below contained the bare statements that the "1980 Act grossly contravenes and is facially repugnant to the . . . 'equal protection'" clause of the Fourteenth Amendment and the further statement that the Arizona Supreme Court's opinion sanctions, "invidious discrimination facially apparent upon a review of the 1980 Act favoring certain cities and towns, industry and all other users of groundwater for any purpose except the users of groundwater for growing of food and fiber as to which users the Act is grossly invidiously discriminatory." (JS, appendix F at F-2) Such bare statements without more do not properly frame any issues. Moreover, the Arizona Supreme Court has long held that issues advanced before it for the first time on rehearing would not be considered. Love v. Bracamonte, 29 Ariz. 357, 359, 241 P. 514, 514-15 (1925). This Court has also ruled that issues asserted for the first time on motions for rehearing in state court will not be considered here. See Hanson v. Denckla, 357 U.S. 235, 243-44, 78 S. Ct. 1228, 1234 (1958); McCorquodale v. Texas, 211 U.S. 432, 437, 29 S. Ct. 146, 148 (1908).

> "This brings us to conclude that appellants' position that the 1980 Act violates the Fifth and Fourteenth Amendments to the Constitution of the United States . . . cannot be sustained. Chino Valley v. Prescott, _____ Ariz. _____, 638 P.2d 1324, 1328." (JS 4).

The words represented by the ellipsis in appellants' quotation are:

> . . . and art. 2, § 17 of the Constitution of the State of Arizona as a taking of private property without due process of law and just compensation . . . . 131 Ariz. at 82, 638 P.2d at 1328 (Emphasis added.).

Issues of equal protection were not presented to or considered by the Arizona Supreme Court.

The Jurisdictional Statement is required to "specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court." United States Supreme Court Rules 15.1(g). As to all questions except those discussed in the motion to affirm, supra, this requirement

has not been met because the questions were either raised here for the first time, or were raised for the first time on a motion for rehearing before the Arizona Supreme Court, and were thus untimely.

The Arizona appellate courts require the appellant to "concisely and clearly set forth . . . the issues presented for review. . . . [and] [a]n argument, which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Arizona Rules of Civil Appellate Procedure 13(a)(5), 13(a)(6). When, as here, an issue is not presented in conformance with this rule it is deemed abandoned, and will not be considered by the Arizona appellate courts. DeElena v. Southern Pacific Co., 121 Ariz. 563, 572, 592 P.2d 759, 768 (1979); Stallcup v. Coscarart, 79 Ariz. 42, 45, 282 P.2d 791, 793 (1955).

Arizona's appellate procedure provides a

reasonable opportunity to present constitutional issues. State rulings which preclude consideration of these issues for failure to meet the procedural requirements are honored by this Court. Central Union Telephone Co. v. City of Edwardsville, 269 U.S. 190, 194-95, 46 S. Ct. 90, 90-91 (1925); Parker v. Illinois, 333 U.S. 571, 574-76, 68 S. Ct. 708, 710 (1948).

ARGUMENT IN SUPPORT OF MOTION TO AFFIRM

I

THE PUBLIC INTEREST IN PRESERVING THE GROUNDWATER SUPPLIES AVAILABLE TO ALL WATER USERS WARRANTED THE FULL EXERCISE OF THE STATE'S POLICE POWER.

This Court noted in Colorado River Water Conservation District v. United States, 424 U.S. 800, 804, 96 S. Ct. 1236, 1239 (1976), that "[i]t is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." In Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S. Ct. 529 (1908), this Court said few matters are more affected with the public interest than the management of water.

Hudson upheld under the police power a New Jersey statute which prohibited the transportation of water out of the state. This Court declined to consider the state law question of what the particular water rights

doctrine had been prior to enactment of the statute. It was enough that the statute was sustainable under the police power.

The defendant in Hudson, who had contracted to supply water to Staten Island, New York, asserted a right of absolute ownership, but the lower court had ruled that the applicable doctrine was riparian rights. Justice Holmes, writing for the majority, said:

> [W]e shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in error that it is open to revision when constitutional rights are set up. . . . But we prefer to put the authority, which cannot be denied to the state, upon a broader ground than that which was emphasized below . . . .
>
> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. . . .

* * *

> [I]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. 28 S. Ct. at 530-31. (Emphasis added.).

Total use of groundwater and surface water in Arizona has expanded to nearly twice the annual dependable supply. Annual water consumption is 4.8 million acre feet; dependable surface and groundwater supply is 2.8 million acre feet. The shortage is made up by the mining of groundwater in storage. Groundwater depletion is now more than 7 times the rate of groundwater recharge. Water tables, which already range from typical depths of 350 to 400 feet throughout central Arizona, are dropping at rates of

4 to 14 feet per year.[2]

The Arizona Supreme Court in sustaining the Legislature's exercise of the police power in the decision below, quoted in full the following declaration of policy in A.R.S. § 45-401:

> "A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature

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[2] Arizona Water Commission, Arizona State Water Plan, Phase I, "Inventory of Resource and Uses" (Summary) 7, 12, 33-34 and Table 12. (July, 1975). See also Arizona Water Commission, Arizona Water Plan, Phase II, "Alternative Futures" (Feb. 1977). The Arizona state water plan, not in the record below, was prepared by the Arizona Water Commission pursuant to A.R.S. § 45-506 (repealed 1980), 1971 Ariz. Sess. Laws, Ch. 49, § 7, and is judicially noticeable under Federal Rules of Evidence 201, 803(8), 902(5).

evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

"B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state." 131 Ariz. at 82-83, 638 P.2d at 1328-29 (Emphasis added.).

Following this quotation, the Court stated:

We do not doubt but that the overdraft of groundwater in this state is a serious problem which has no chance of correcting itself, and that it is necessary for comprehensive legislation to both limit groundwater use and allocate its use among competing interests. Id. at 83, 638 P.2d at 1329.

In the decision below, the Arizona Supreme Court referred to this Court's decision in Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138 (1980), where it

was held that the City of Tiburon had sufficient interest in protecting its residents from the ill effects of urbanization that it could constitutionally limit the use of prime suburban land to one single-family house per acre.

Under the considerations discussed in Agins, the 1980 Arizona Groundwater Management Act is clearly a valid exercise of the police power. In Agins, this Court considered:

1. Whether the ordinance will "substantially advance legitimate State interests". 100 S. Ct. at 2141. The 1980 Act, designed to control groundwater overdraft and allocate remaining groundwater supplies, substantially advances legitimate State interests.

2. Whether the ordinance will deny "an owner economically viable use of his land". 100 S. Ct. at 2141. The 1980 Act allows all existing groundwater uses to continue subject to reasonable

conservation requirements. A.R.S. §§ 45-462; 45-564 to 45-568. Domestic wells, including new ones, are exempt from the Act. A.R.S. § 45-454. All landowners are entitled to apply for new uses of groundwater on the conditions specified by the Act. See, e.g., A.R.S. §§ 45-451, 45-452, 45-454, 45-464.D, 45-472.D, 45-492, 45-511 to 45-519, 45-576.

3. Whether the ordinance "is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest". 100 S. Ct. at 2141. Groundwater management statutes may be the best example of the aptness of the observation repeated in Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318, 326-27 (1979):

> Suffice it to say that government regulation - by definition - involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all

> such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). (Emphasis added.).

And see Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978); Deltona Corp. v. United States, 657 F.2d 1184, 1190 (Ct. Cl. 1981), cert. denied, ____ U.S. ____, ____ S. Ct. ____, 50 U.S.L.W. 3765 (1982).

4. That there was no indication that the appellants' tract was the only property affected by the ordinances. 100 S. Ct. at 2142. The 1980 Act applies statewide. The Initial Active Management Areas designated by the Act include most of the State's population and account for the major portion of the State's groundwater overdraft.

5. Whether the complainants "will share with other owners the benefits and

burdens" of the exercise of the police power. 100 S. Ct. at 2142. Undeniably, appellants, as members of the general public, will share the benefits of the Act; but as landowners with already developed groundwater uses, appellants will be even more directly among the prime beneficiaries of the 1980 Act. The Act requires the State Department of Water Resources to implement a management plan for the Prescott Active Management Area designed to achieve the goal of "safe yield" by the year 2025, meaning groundwater levels will no longer decline. A.R.S. §§ 45-563, 45-561(6), 562(A). The management plans will include programs to conserve and augment the water supplies in Active Management Areas and may also include programs to purchase and extinguish existing groundwater uses. A.R.S. §§ 45-565(A)(4), 45-566(A)(4),(6), 45-567(A)(4),(6), 45-568.

These tests, satisfied in Agins in the

zoning context, are even more convincingly satisfied in the context of allocating a resource in short supply which is essential to the sustenance of the human and economic life of the State.

In their assertion of the right to rely on dicta in state court opinions as rules of property entitled to constitutional protection, appellants omit entirely any mention of Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955). That case sustained under the police power the constitutionality of the 1948 groundwater code which prohibited the drilling of new irrigation wells in areas of the State lacking sufficient groundwater to sustain then existing irrigation uses. The statute effectively prohibited the irrigation of hundreds of thousands of acres of undeveloped lands which had little or no value except for their potential future use for irrigated agriculture.

The Court said that the rule derived from Howard v. Perrin, 8 Ariz. 347, 76 P. 460 (1904), aff'd, 200 U.S. 71, 26 S. Ct. 195 (1906), and Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), as modified, 39 Ariz. 367, 7 P.2d 254 (1932), was that as between individual users of groundwater, the doctrine of reasonable use would apply. But:

> Specifically the question was left open as to the right of the state against individuals to regulate the consumption of ground water in the interest of the general welfare. 79 Ariz. at 408-09, 291 P.2d at 767-68.

As here, the plaintiff alleged that it "owned" the groundwater beneath its lands and that such property right was protected against confiscation by the Constitution. The Court considered those specific contentions and held:

> It can thus be seen that a conflict occurs between appellant and the state by reason of the interest of the public in the

preservation from destruction of a resource essential to the sustenance of life. Where the public interest is thus significantly involved, the preferment of that interest over the property interest of the individual even to the extent of its destruction is a distinguishing characteristic of the exercise of the police power.

* * *

The supply of ground water within the territorial boundaries of the state, or any particular groundwater basin therein, is not unlimited and even though in some instances the limits thereof may be difficult to apprehend, ultimately and inevitably at one time or another it will become necessary to restrict the use merely because the available users and uses exceed the available supply. We do not doubt that it is the proper sphere of the legislature, in the interest of the general welfare, to say when that time has arrived by establishing the mechanics for its determination and upon such determination prescribing the economical consumption which constitutes the most efficient use of water. Id. at 409, 411, 291 P.2d at 768, 770 (Emphasis added, footnotes omitted.).[3]

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[3] The need to regulate and provide access to water supplies for the greater

(footnote 3 continued on next page)

This language and the holding in Southwest Engineering were based in part upon this Court's decision in Miller v. Schoene, 276 U.S. 272, 48 S. Ct. 246 (1928), recently discussed in Penn Central Transportation Co. v. New York, 438 U.S. at 125-26, 98 S. Ct. at 2660. Where infected cedar trees were threatening to

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(continuation of footnote 3)

public good has provided several examples of legislation abrogating surface and groundwater doctrines which have been sustained under the police power. See, e.g., California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555 (9th Cir. 1934), aff'd, 295 U.S. 142, 55 S. Ct. 725 (1935); Baumann v. Smrha, 145 F. Supp. 617 (D. Kan.), aff'd per curiam, 352 U.S. 863, 77 S. Ct. 96 (1956); Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578 (1962), appeal dismissed, 375 U.S. 7, 84 S. Ct. 46 (1963); Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 670 (Fla.), cert. denied, 444 U.S. 965, 100 S. Ct. 453 (1979); Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627, 635-36 (1973); Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708, 711, 714 (1964); Crookston Cattle Co. v. Minnesota Department of Natural Resources, 300 N.W.2d 769, 774 (Minn. 1980); In re Hood River, 114 Or. 112, 227 P. 1065 (1924), writ of error dismissed sub nom. Pacific Power & Light Co. v. Bayer, 273 U.S. 647, 47 S. Ct. 245 (1926).

destroy apple trees, this Court upheld the destruction of the cedar trees by the State of Virginia under the police power. It was noted that there was an unavoidable choice between preserving one class of property or another, and that:

> there . . . [was] a preponderant public concern in the preservation of the one interest over the other". [Citation omitted.] And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. 276 U.S. at 279-80, 48 S. Ct. at 247 (Citations omitted.).

The Arizona Legislature has not destroyed any class of property, as this Court in Miller v. Schoene, and the Arizona Supreme Court in Southwest Engineering and Chino Valley II, said it may when forced to the choice. The 1980 Act allows all existing uses to continue and allows all landowners to qualify for new uses on the conditions prescribed by statute.

II

THERE IS NO RIGHT TO RELY UPON DICTUM AS A RULE OF PROPERTY UNDER ARIZONA LAW.

As demonstrated below, the Arizona Supreme Court's characterization of its prior statements on ownership of groundwater as dicta was plainly accurate. Appellants argue that, even if dicta, these prior statements created a property right by "holding out certain property ownership law principles as constituting established law and thereby leading . . . [Arizona's] citizens to accept and rely upon such representations in property investment matters." (JS 13). This is not the law of Arizona.

The Arizona Supreme Court has repeatedly held that its statements on points not directly presented or necessary to resolution of the issues before it in a particular case are neither binding as precedent nor controlling when the issue is directly presented in a subsequent

action. See, e.g., Hernandez v. Banco De Las Americas, 116 Ariz. 552, 555, 570 P.2d 494, 497 (1977); Catchpole v. Narramore, 102 Ariz. 248, 250, 428 P.2d 105, 107 (1967); Hernandez v. County of Yuma, 91 Ariz. 35, 36, 369 P.2d 271, 271 (1962). This has been the rule since the territorial era. Friedman v. Suttle, 10 Ariz. 57, 63, 85 P. 726, 728 (1906). It is also the rule in this Court. NLRB v. Hendricks County Rural Electric Membership Corp., ___ U.S. ___, 102 S. Ct. 216, 226-27 (1981); McDaniel v. Sanchez, 452 U.S. 130, 141, 101 S. Ct. 2224, 2231-32 (1981); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

Appellants' authority for their right to rely upon dicta in the decisions of a court is Pease v. Peck, 59 U.S. (18 How.) 595 (1856). Appellants state that "[r]es judicata is not necessarily an essential ingredient in a property right." (JS 13). Pease is not authority for that statement.

But if any right to rely upon prior decisions might have been claimed as a rule of property by either of the parties under the circumstances of that case, the right of reliance would have been claimed in a holding, not a dictum of a court.

III

THE HOLDING BELOW THAT THERE IS NO OWNERSHIP IN UNPUMPED GROUNDWATER IS A CORRECT STATEMENT OF ARIZONA PROPERTY LAW. IT DOES NOT DEPART FROM PRIOR ARIZONA DECISIONS.

Appellants assert on authority of Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U.S. 537, 50 S. Ct. 401, aff'd per curiam, 282 U.S. 187, 51 S. Ct. 94 (1930), that a state court decision resting upon inadequate state law cannot withstand federal constitutional scrutiny (JS 12-13). Broad River states the obvious principle that "[w]hether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court." 281 U.S. at 540, 50 S. Ct. at 402. Further, the federal constitutional question cannot be avoided by asserting an insubstantial

state ground for the lower court decision. But Broad River is not authority for the proposition that this Court should revisit state court determinations of previously unresolved matters of state law.

This section of this memorandum reviews appellants' authorities on groundwater ownership. It demonstrates that the Arizona Supreme Court has never held that any right of ownership existed in groundwater prior to capture and that the decision below rests upon a fair and substantial basis. This analysis is made, however, without prejudice to the paramount contention that under the police power the Arizona Legislature could have abrogated even a vested property right in unpumped groundwater.

Howard and Southwest Cotton.

The source of the ownership dictum on which appellants rely is Howard v. Perrin, 8 Ariz. 347, 353, 76 P. 460, 462 (1904), aff'd, 200 U.S. 71, 26 S. Ct. 195 (1906).

The dictum was repeated in Maricopa County Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), as modified, 39 Ariz. 367, 7 P.2d 254 (1932). In both cases the water claimants had alleged appropriations from underground streams. Under Arizona law, surface and underground streams, as distinguished from percolating groundwater, are subject to the doctrine of prior appropriation. The nature of rights in groundwater was not involved in either case. Southwest Cotton expressly reserved determination of the nature of rights in groundwater for the future. 39 Ariz. at 83-84, 4 P.2d at 376.

Bristor II

Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 255 P.2d 173 (1953), which adopted the reasonable use rule for percolating groundwater in Arizona, is inconsistent with the notion of ownership. For example, the Court assumed a choice

among different water doctrines other than prior appropriation, including the English rule, the reasonable use doctrine, and the correlative rights doctrine; and it adopted a rule which both permitted and limited the right to use groundwater to amounts necessary for the beneficial use of land. The Court's observation that what is a "reasonable use" changes with facts and circumstances and from time to time nowhere implies ownership of groundwater. 75 Ariz. 237-38, 255 P.2d at 179-80. The Court also noted the possibility of use of the police power by the Legislature to prevent the exhaustion of water supplies, citing Hudson, supra, and California-Oregon Power Co. v. Beaver Portland Cement Co., supra n.3, but declined to enter a holding concerning whether and to what extent the police power might be used; it said the issue would be decided when properly presented. 75 Ariz. at 234-35, 255 P.2d at 177-78.

Anway

Appellants omit mention of Southwest Engineering, the one decision in which the Arizona Supreme Court did consider the contention that the landowner "owned" groundwater beneath his land (discussed above at pages 24-26) and skip to State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960). The issue there was whether the 1948 code prohibited the defendants from irrigating land not previously cultivated. That the Court took as given the fact that the statute could prohibit drilling new wells for irrigation is completely inconsistent with the appellants' assertions here of ownership.

The Jarvis Decisions

Likewise in Jarvis v. State Land Department (Jarvis I), 104 Ariz. 527, 456 P.2d 385 (1969), ownership was not in issue. The issue was whether an undisputed transportation of groundwater by the City of Tucson injured the plaintiffs. The Court found injury but later modified

its injunction in Jarvis v. State Land Department (Jarvis II), 106 Ariz. 506, 479 P.2d 169 (1970), to allow Tucson to retire irrigated land in the source basin and transport water to the City in amounts commensurate with the retired use. Significantly, the Court sanctioned legislation allocating water use among competing water users by basing its opinion upon a State statute which preferred municipal uses over irrigation uses in the use of surface waters. (There was and still is no comparable groundwater preference statute in Arizona.)

> The creation of such a priority clearly evidences a legislative policy that the needs of agriculture give way to the needs of municipalities. Id. at 511, 479 P.2d at 174.

FICO

Appellants next cite Farmers Investment Co. v. Bettwy (FICO), 113 Ariz. 520, 558 P.2d 14 (1976), but as the very quotation set forth by appellants (JS 9-10) establishes, the issue was not

ownership of groundwater but whether the defendants' uses of groundwater were "off the land" from which the groundwater was pumped and thus subject to injunction.

FICO renewed the invitation of Bristor II and Southwest Engineering, that the Legislature establish priorities among competing groundwater users. The Court said its modification in Jarvis II of the injunction against the City of Tucson was not precedent for allowing courts to adjust water rights among existing users where there is not enough water to go around. That is the function of the Legislature:

> If it is to the State's interest to prefer mining over farming, then the Legislature is the appropriate body to designate when and under what circumstances such economic interest will prevail. 113 Ariz. at 527, 558 P.2d at 21 (Emphasis added.).

Chino Valley I

In Town of Chino Valley v. State Land Department (Chino Valley I), 119 Ariz. 243, 580 P.2d 704 (1978), the Arizona

Supreme Court refused to hold unconstitutional the 1977 act which created the Groundwater Management Study Commission to draft the 1980 Act. The Court approved the creation of the Commission and referred to its earlier statement in FICO:

> We stated that if one interest was to be preferred over the other, the Legislature was the appropriate body to designate which economic interest would prevail. Id. at 245, 580 P.2d at 705 (Emphasis added.).

The decision below rests on a fair and substantial basis.

The Arizona Supreme Court has not departed from its prior decisions. More than 50 years ago, in Southwest Cotton, the holding that groundwater was not subject to the doctrine of prior appropriation was accompanied by the caveat that the precise doctrine which did apply to groundwater was reserved for future determination. When the Arizona Supreme Court first defined rights to the use of groundwater in 1953 by adopting the

reasonable use doctrine in Bristor II, it stated that all such rights may be subject to modification by the Legislature under the police power. The Legislature's exercise of the police power which prohibited increased pumping for irrigation was upheld almost immediately in Southwest Engineering Co. v. Ernst. From that decision onward, the Arizona Supreme Court repeatedly stated that authority is reserved to the Legislature to allocate groundwater among competing uses and to prescribe which uses of groundwater are in the best interests of the general welfare of the State.

CONCLUSION

Water statutes frequently invoke the police power. Where effective groundwater controls have not previously existed, it is impossible to enact legislation to control or reduce overdraft without substantially impacting both present and future rights to the use of water. When the right to use water is limited or conditioned, the purposes for which land may be used are also affected. The value of land may consequently be diminished or substantially destroyed.

The pervasive physical fact is that there is not enough groundwater available for every landowner to develop his land as he pleases. If the police power of the State is denied, the State has no alternative but to allow unrestricted and uncontrolled groundwater pumping to continue. Some persons would be totally denied access to water while others would race each other to the bottom of the

aquifers to the common ruin of all. That is the direct consequence of the invalid assertion that the State may not regulate and prospectively allocate the use of groundwater among competing users without compensating every landowner in Arizona.

This is a clear case of compelling public necessity.

The decision of the Arizona Supreme Court should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of May, 1982.

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Attorneys for the State of Arizona, Appellee in Intervention

CERTIFICATE OF SERVICE

Three copies of the foregoing Motion of the State of Arizona for Leave to Intervene and proposed Motions of the State of Arizona to Affirm and Dismiss were served by hand-delivery on May 17, 1982 on each of the following persons:

MARK WILMER, ESQ.
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Three copies were also mailed, first class postage prepaid, on May 17, 1982 to:

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These gentlemen represent all parties to this appeal required to be served.

James W. Johnson
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as Appellee

Opposition

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1882

In The Supreme Court of the United States

October Term, 1981

TOWN OF CHINO VALLEY, a municipal corporation; and TOM M. SULLIVAN, WILLIAM J. WELLS and EDWIN J. JOHNSON, for and on behalf of themselves and other persons and legal entities constituting a class too numerous to be named as parties,

Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

OBJECTION TO MOTION FOR LEAVE TO INTERVENE

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Appellants.

v.

THE CITY OF PRESCOTT, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

OBJECTION TO MOTION FOR LEAVE TO INTERVENE

Pursuant to Rules 42, 39 and 33 of the Rules of this Court, appellant objects to the Motion for Leave to Intervene purportedly filed on behalf of the State of Arizona[1] for the following reasons:

[1] Although the motion claims that it is submitted on behalf of the State of Arizona, as will be shown below, this is not an accurate disclosure of the nature and identity of the entity seeking intervention. It is clear that in no sense is the motion brought on behalf of the State of Arizona, as the Attorney General of Arizona has previously determined that it would be inappropriate for the State to intervene of the side of appellee.

1. The Motion to Intervene inappropriately relies on Title 28 U.S.C. §2403(b) as providing statutory authority for the requested intervention. That statute requires that notice be given to the state attorney general in certain cases where the constitutionality of a state statute is in issue.

The structure and terms of the statute lead inescapably to two separate conclusions concerning the circumstances under which intervention may be requested. First, the determination of whether a state shall seek intervention is to be made by the chief legal officer of that state, the attorney general.[2] Only the attorney general can make the determination of whether the "public interest" warrants intervention. Second, intervention, if sought, is to be sought on behalf of the state as a whole, and not by special counsel seeking to represent the special interests of one state agency.[3]

The present case shows the wisdom strict adherence to this statutory scheme. The Arizona Attorney General has expressed "serious reservations" as to the constitutionality of the statute at issue because of its adverse impact on the value of State trust land,[4] and has determined that the State of Arizona ought not support appellee's position in this case. In making that determination, the Arizona Attorney General spoke for the State of Arizona as its chief legal officer. Despite that, the Arizona Department of Water Resources, through its Director and special private counsel, now seeks to overrule, or at least circumvent, this decision and to speak unreservedly for the entire State. Title 28 U.S.C. §2403(b) provides no authority for this usurpation of

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[2] Arizona law is consistent with 28 U.S.C. §2403(b) in this regard as A.R.S. §41-192(A) makes the Arizona Attorney General the "chief legal officer of the state."

[3] Here, counsel for the purported intervenor has previously appeared in this action and in the prior case, *Chino Valley v. State Land Dept.*, 119 Ariz. 243, 580 P.2d 704 (1978), on behalf of a large mining company, the Duval Corporation.

[4] *See*, letter of May 17, 1982, a copy of which is reproduced in Appendix A hereto.

power; nor does applicable Arizona law.

2. Special counsel for the purported intervenor relies on A.R.S. §45-104(G) as authority for the Director of the Department of Water Resources ("Director") to employ him to intervene on behalf of the State. That statute in general terms permits the Director to employ private counsel. It does not authorize the Director to retain counsel to appear for the State of Arizona generally, and particularly not in an instance where the Attorney General has determined that the State's interests do not coincide with the Director's.

A.R.S. §45-104(G) only permits the Director to employ counsel to represent the Department of Water Resources and the State in "litigation concerning the affairs of the department". The Arizona statutes do not make determinations as to the constitutionality of a state statute an affair of the Department of Water Resources. Plainly, the authority extended to the Director by this statute does not include the right to overrule the Attorney General of the State. A.R.S. §41-193(A) (3) gives the authority to represent the state in any action in federal court to the Attorney General and the Department of Law and not to The Department of Water Resources and its Director. Here, the Attorney General's determination not to intervene on behalf of appellee is binding on the Director and the Director has no authority to seek to intervene on behalf of the State of Arizona.

3. Title 28 U.S.C. §2403(b) was added by P.L. 94-381, 90 Stat. 1120. Section seven of that Act provided: "This Act shall not apply to any action commenced on or before the date of enactment." The date of enactment was August 12, 1976. This action was commenced in 1972 and the statute, therefore, cannot provide authority for the intervention sought.

RESPECTFULLY SUBMITTED this 18th day of May, 1982.

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By /s/ MARK WILMER
Mark Wilmer

By /s/ ROBERT B. HOFFMAN
Robert B. Hoffman

Attorneys for Appellant

CERTIFICATE OF SERVICE

Robert B. Hoffman, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for appellants herein.

2. That this 18th day of May, 1982, the Objection To Motion For Leave To Intervene submitted herewith has been served upon counsel of record in accordance with the provisions of Rule 28.3 of the Rules of this Court by placing three copies of the same in the United States mail, first-class postage prepaid, properly addressed to each of:

Bill Stephens
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100 West Washington
Suite 1700
Phoenix, Arizona
Attorneys for Purported Intervenor

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28, Rules of the United States Supreme Court.

/s/ ROBERT B. HOFFMAN
Robert B. Hoffman

Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert K. Corbin

Mr. Wesley Steiner
Director
Arizona Water Resource Department
99 E. Virginia
Phoenix, AZ 85004

May 17, 1982

Re: Town of Chino Valley, et al,
vs. City of Prescott
No. 81-1882
U.S. Supreme Court

Dear Mr. Steiner:

With regard to the above-referenced action, please be advised that since the Arizona Ground Water Code negatively impacts the value of the state trust land administered by the Arizona Land Department, we have serious reservations as to the constitutionality of that state law vis-a-vis the trust responsibility created by Congress when Arizona achieved statehood. Consequently, it is our belief that the State of Arizona should not be an amicus curiae in support of the appellee in the United States Supreme Court. Our position, of course, does not prevent your department, in its own name, from appearing as an amicus curiae, providing that the proper disclosure is made to the Court as it was subsequently done in the Arizona Supreme Court.

If you have any further questions, please feel free to call me or our Solicitor General, Anthony B. Ching.

Very truly yours,

/s/ Bob Corbin
BOB CORBIN
Attorney General

BC:bc

ccs: Alexander C. Stevas, Esq.
Clerk, U.S. Supreme Court

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